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1. 1









AN

*O. Howard*  
*1842*

ABRIDGMENT

OF THE

LAW OF NISI PRIUS.

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VOL. I.

1. ASSUMPSIT.  
2. ATTORNEY.  
3. BANKRUPTCY.  
4. BILLS OF EXCHANGE.

5. CARRIERS.  
6. CASE.  
7. COVENANT.

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BY

*Patrick*  
P. BRADY LEIGH, ESQ.,

OF THE INNER TEMPLE, BARRISTER AT LAW.

WITH NOTES AND REFERENCES TO THE LATEST AMERICAN CASES,

BY

GEORGE SHARSWOOD.

---

IN TWO VOLUMES.

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PHILADELPHIA:

P. H. NICKLIN & T. JOHNSON, LAW BOOKSELLERS,

NO. 2 SOUTH SIXTH STREET.

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1838.

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**Philadelphia:**  
**T. K. & P. G. COLLINS, Printers,**  
**No. 1 Lodge Alley.**

TO  
THE RIGHT HONORABLE  
HENRY, LORD BROUGHAM AND VAUX,  
WITH  
THE HIGHEST RESPECT FOR  
HIS TRANSCENDENT TALENTS,  
AND  
WITH A DUE SENSE  
OF THE EXTENSIVE  
AND  
BENEFICIAL IMPROVEMENTS  
WHICH, THROUGH HIS INSTRUMENTALITY,  
HAVE BEEN EFFECTED  
IN THE JURISPRUDENCE  
AND  
LEGAL INSTITUTIONS OF HIS COUNTRY,  
THIS WORK IS DEDICATED,  
BY  
HIS MOST DEVOTED SERVANT,  
THE AUTHOR.





## PREFACE.

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THE production of a new Treatise on the Law of *Nisi Prius*, while a book of established reputation on the same subject is before the public, may be thought to require some apology. It was, however, conceived, that a work treating of this branch of the law with more minute accuracy than any existing publication, was called for by the Profession. With a view to supply a want felt by the practitioner, the Author has endeavored to introduce into this compilation every point and case of practical importance relating to the subjects which it embraces. The modern changes in the laws and practice have been particularly attended to; the new Rules, the recent Statutes, and all the decisions under them applicable to *Nisi Prius*, down to the period of publication, will be found under appropriate heads.

Although this work is principally designed for members of the profession engaged in actual practice, no pains have been spared to make it also useful to the student. Under each head, the Author has endeavored to lay down the principles of the law as collected from the authorities; the grounds of the decisions are generally given in the language of the Court, as being more satisfactory than any rule which he felt he could extract from them; the leading cases are set forth at considerable length—those parts only of the reports being omitted which could not assist in illustrating the principles upon which the decisions are founded; and the rules of pleading and evidence applicable to the different actions are carefully incorporated.

Every mechanical device has been resorted to for the purpose of facilitating reference. The Author flatters himself that the arrangement, the uniform divisions of each subject, the marginal notes, the heading of the pages, and the index, are well calculated for that end.

If the utility of the work bear any proportion to the labor and anxiety which it has cost the Author, his expectations will be amply realised. In submitting it to the judgment of the Profession, he feels confident, that if they find it in any degree serviceable, their liberality will treat its defects with indulgence.

P. B. L.

3, PLOWDEN BUILDINGS, TEMPLE,  
February 10, 1838.

## ADVERTISEMENT TO THE AMERICAN EDITION.

**THE** Publishers here offer to the Profession, a Digest of the Law applicable to Trials at Nisi Prius, which will be found peculiarly valuable as an adjunct to Selwyn, from its comprising all the latest English cases. With this view the American editor has confined himself to the latest reported cases in the United States, principally to those posterior to the last edition of Wheaton's Selwyn, by Mr. Wharton. He has added also in the Appendix a few notes on Account Render, an action entirely obsolete in England, but still in use in some of the United States. The work itself is a compilation evincing great care and accuracy, and the method of it well adapted either for continuous study or occasional reference.

G. S.

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## ABBREVIATIONS USED IN THIS WORK.

Adams. Adams on Ejectment, 3d edit.	Inst. Coke's Institutes.
Add. Addams's Reports.	Comb. Comberbatche's Reports.
Ad. & Ell. Adolphus and Ellis's Reports.	Com. Dig. Comyn's Digest.
Aleyn. Aleyn's Reports.	Comyn. Comyns's Reports.
Amb. Ambler's Reports.	Cowp. Cowper's Reports.
And. Anderton's Reports.	Cro. Eliz. } Croke's Reports in the time of
Anstr. Anstruther's Reports.	Cro. Jac. } Elizabeth, James, and Charles the
Arch. Archbold's Bankrupt Laws, 6th edit.	Cro. Car. } 1st.
Atk. Atkyn's Reports.	C. & J. Crompton and Jervis's Reports.
Bac. Ab. Bacon's Abridgment.	C. & M. Crompton and Meeson's Reports.
Barnes. Barnes's Notes.	C. M. & R. Crompton, Meeson, and Roscoe's Reports.
B. & A. Barnewall and Alderson's Reports.	Danv. Ab. Danver's Abridgment.
B. & Ad. Barnewall and Adolphus's Reports.	Dea. & Ch. Deacon and Chitty's Reports.
B. & C. Barnwall and Crosswell's Reports.	Doug. Douglas's Reports.
Bayley. Bayley on Bills, 5th edit.	Dow. Dow's Reports.
Bing. Bingham's Reports.	Dowl. Dowling's Reports.
Bing. N. C. Bingham's New Cases.	D. & R. Dowling & Ryland's Reports.
Bl. Sir Wm. Blackstone's Reports.	Dyer. Dyer's Reports.
Bl. Com. Blackstone's Commentaries.	East. East's Reports.
Bligh. Bligh's Reports.	Eden. Eden's Bankrupt Laws, 2d edition.
Bligh. N. S. Bligh's New Series.	Eq. Cas. Ab. Equity Cases Abridged.
B. & P. Bosanquet and Puller's Reports.	Esp. Espinasse's Reports.
Bradby. Bradby on Distress.	Fitzg. Fitzgibbon's Reports.
Bro. Ab. Brooke's Abridgment.	F. N. B. Fitzherbert's Natura Brevium.
Bro. C. C. Browne's Chancery Cases.	Forr. Forrest's Reports.
Bro. C. P. Browne's Cases in Parliament.	Freeman. Freeman's Reports.
B. N. P. Buller's Nisi Prius.	Gale. Gale's Reports.
Bulstr. Bulstrode's Reports.	Gilb. Dist. Gilbert on Distress.
Burr. Burrow's Reports.	Gilb. Ev. Gilbert's Evidence.
Byles. Byles on Bills.	Glyn. & J. Glynn and Jameson's Reports.
Camp. Campbell's Reports.	Gow. Gow's Reports.
C. & P. Carrington & Payne's Reports.	H. Bl. Henry Blackstone's Reports.
Cart. Carter's Reports.	Hagg. Haggard's Reports.
Carth. Carthew's Reports.	Hard. Hardre's Reports.
Cas. temp. Hard. Cases tempore Hardwicke.	H. & W. Harrison and Wollaston's Reports.
Ch. Chitty's Reports.	Hawk. P. C. Hawkin's Pleas of the Crown.
Chitty. Chitty on Bills.	Henley. Lord Henley's Bankrupt Laws.
Ch. Con. Chitty on Contracts.	Hob. Hobart's Reports.
Ch. Pl. Chitty on Pleading.	Hodges. Hodges's Reports.
Clar. & F. Clarke and Finnely's Reports.	Holt. Holt's Reports.
Co. Coke's Reports.	Hutt. Hutton's Reports.
Co. Litt. Coke upon Littleton.	

Sir T. Jones. Sir Thomas Jones's Reports.	Run. Runnington on Ejectments.
Sir Wm. Jones. Sir William Jones's Reports.	Russ. Russell's Reports.
Keb. Keble's Reports.	R. & M. Ryan and Moody's Reports.
Keilw. Keilway's Reports.	Salk. Salkeld's Reports.
Kel. Kelynge's Reports.	S. C. Same Case.
Leon. Leonard's Reports.	S. P. Same Point.
Lev. Levintz's Reports.	Sav. Saville's Reports.
Lofft. Lofft's Reports.	Saund. Pl. & Ev. Saunders's Pleading and Evidence.
Lutw. Lutwyche's Reports.	Saund. Saunderson's Reports, 5th edit.
M'Clel. & Y. M'Clelland and Young's Reports.	Sayer. Sayer's Reports.
Madd. Maddock's Reports.	Sch. & Lef. Schoale and Lefroy's Reports.
M. & R. Manning and Ryland's Reports.	Scott. Scott's Reports.
Marsh. Marshall's Reports.	Sellon, or Sel. Prac. Sellon's Practice.
Marshall. Marshall on Insurance.	S. N. P. Selwyn's Nisi Prius.
M. & S. Maule and Selwyn's Reports.	Shep. Touch. Shepherd's Touchstone.
M. & W. Messon and Welsby's Reports.	Show. Shower's Reports.
Meriv. Merivale's Reports.	Sid. Siderfin's Reports.
Mod. Modern Reports.	Sim. & Stu. Simmon and Stuart's Reports.
Mont. Montague on the Law of Set-off.	Sim. Simon's Reports.
Mont. B. Montague's Bankrupt Laws.	Skin. Skinner's Reports.
Mon. & Ayr. Montague and Ayrton's Reports.	Smith. Smith's Reports.
M. & M. Moody and Malkin's Reports.	Stark. Starkie's Reports.
M. & Rob. Moody and Robinson's Reports.	Stark. Ev. Starkie on Evidence.
M. & P. Moore and Payne's Reports.	Stra. Strange's Reports.
M. & Scott. Moor and Scott's Reports.	Sty. Style's Reports.
Moore. Bailey Moore's Reports.	Sudg. Vend. Sugden on Vendors and Purchasers.
Mur. & Hur. Murphy and Hurlestone's Reports.	Taunt. Taunton's Reports.
Myl. & K. Mylne and Keen's Reports.	T. R. Term Reports by Durnford and East.
N. & M. Neville and Manning's Reports.	Tidd. Tidd's Practice, 9th edit.
N. & P. Neville and Perry's Reports.	Toller. Toller's Law of Executors and Administrators, 5th edit.
N. R. New Reports by Bosanquet and Puller.	Touchst. Touchstone.
Noy. Noy's Reports.	Tyr. Tyrwhitt's Reports.
Palm. Palmer's Reports.	Vaugh. Vaughan's Reports.
Park. Park on Insurance.	Vent. Ventris's Reports.
Peake. Peake's Reports.	Vern. Vernon's Reports.
Peak. Ev. Peake's Evidence.	Ves. Vesey's (junior) Reports.
P. Wms. Peer William's Reports.	Ves. Sen. Vesey's (senior) Reports.
Phillim. Phillimore's Reports.	V. & B. Vesey and Beames's Reports.
Phill. Ev. Phillips on Evidence.	Vin. Ab. Viner's Abridgment.
Platt. Platt on Covenants.	Wentw. Wentworth's Office of Executors.
Plowd. Plowden's Commentaries.	Wilk. Wilkinson on Replevin.
Pollexf. Pollexfen's Reports.	Willes. Willes's Reports.
Poph. Popham's Reports.	Wms. The Law of Executors and Administrators by Williams.
Pre. Cha. Precedents in Chancery.	Wils. Wilson's Reports.
Price. Price's Reports.	W. W. & D. Willmore, Wollaston, and Davison's Reports.
Ld. Raym. Lord Raymond's Reports.	Woodf. Woodfall's Law of Landlord and Tenant, by Harrison.
Raym. Sir Thomas Raymond's Reports.	Yelv. Yelverton's Reports.
Rol. Ab. Rolle's Abridgment.	Y. & C. Young and Collier's Reports.
Roll. Rolle's Reports.	Y. & J. Young and Jervis's Reports.
Roper. Roper on the Law of Husband and Wife.	
Rose. Rose's Reports.	

**AN ABRIDGEMENT**  
**OF THE**  
**LAW OF NISI PRIUS.**



# AN ABRIDGEMENT OF THE LAW OF NISI PRIUS.

## CHAPTER I. OF THE ACTION OF ASSUMPSIT.

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### SECTION I.

#### IN WHAT CASES THE ACTION OF ASSUMPSIT LIES.

An action of assumpsit lies to recover damages for the non-performance of a simple contract,\* whether express or implied.

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\* All contracts are distinguished into agreements by *specialty*, and agreements by *parol*. A simple contract or agreement by parol, signifies every contract, whether verbal or written, not under seal, per Skinner, C. B. in *Raan v. Hughes*, 7 T. R. 351, n.(1)

(1) (*Perrine v. Cheeseman*, 6 Halst. 174. The same contract may be the specialty of one, and the parol agreement of another party to it, as where one seals and the other does not. *Stabler v. Cowman*, 7 Gill & Johns. 284.)

\*A simple contract may be defined to be the agreement or mutual assent, founded upon sufficient consideration, of two or more persons, to perform some act not prohibited, or to omit the performance of an act not enjoined by law.<sup>a</sup>

*Express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making. *Implied*, are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform.<sup>b</sup>

Implied  
contracts.

As, if I employ any person to do any business for me, or perform any work, the law implies that I undertook or contracted to pay him as much as his labour deserves.<sup>c</sup> On the other hand, every person who undertakes any duty, trust, office, or employment, impliedly contracts with those who entrust or employ him, to perform his undertaking with skill, diligence, and integrity, and the employer may maintain assumpsit for any injury which he has sustained through the absence of any of those qualities.<sup>d</sup> For instance, if I employ a tradesman or workman, he impliedly undertakes to exercise due care and skill, and that his work shall be of the quality which would be bestowed by a person of ordinary skill in his trade.<sup>e</sup> So the law implies an undertaking on the part of surgeons and apothecaries, that they will use reasonable skill and care in the treatment of their patients;<sup>f</sup> and on the part of attorneys and solicitors, that they will execute the business entrusted to their professional management with a reasonable degree of care, skill, and despatch.<sup>g</sup> And assumpsit will lie against either of those parties for a breach of such implied undertaking.

\*3 So assumpsit will lie against a banker if, having sufficient funds in his hands, he does not pay his customers' checks; for he is guilty of a breach of duty which is implied from his contract.<sup>h</sup> If a parson contract that a tenant shall occupy parsonage lands for a *certain number of years*, his resignation of the living before the expiration of that period is a breach of his contract, for which assumpsit will lie; for by the contract he impliedly undertakes to do no act to avoid the agreement, and

<sup>a</sup> 2 Bl. Com. 442; Com. Dig. Agreement, A. 1; Ch. Con. 8; per Lord Ellenborough, C. J., in *Wain v. Walters*, 5 East, 16.

<sup>b</sup> 2 Bl. Com. 443. The only difference between an express and implied contract is in the mode of substantiating it; an express contract is proved by an actual agreement, an implied contract by circumstances; but whenever a contract is once proved, the consequence resulting from the breach of it must be the same, whether it be proved by direct or circumstantial evidence, per Lord Tenterden, C. J., in *Marzetti v. Williams*, 1 B. & Ad. 423. (20 Eng. C. L. 415.)

<sup>c</sup> 2 Bl. Com. 443; *Jewry v. Busk*, 5 Taunt. 302. (1 Eng. C. L. 114.)

<sup>d</sup> *Shiells v. Blackburne*, 1 H. Bl. 158; *Seare v. Prentice*, 8 East, 348; 3 Bl. Com. 163; B. N. P. 73.

<sup>e</sup> *Id.* per Parke, B., in *Cousins v. Paddon*, 2 C. M. & R. 547; 1 Gale, 306; 5 Tyr. 535.

<sup>f</sup> *Seare v. Prentice*, 8 East, 348; see *post*. <sup>g</sup> See title *Attorney*, *post*.

<sup>h</sup> *Marzetti v. Williams*, 1 B. & Ad. 415. (20 Eng. C. L. 412.) This was an action on the case, but the court said that assumpsit would lie.

by his resignation the tenant's title is at an end.<sup>a</sup> So where *A.*, in consideration of *B.*'s consenting to the supersedeas of a commission against him, undertook in the event of his recovering a certain estate to liquidate *A.*'s claim; it was held that assumpsit would lie against *A.* for not taking proper steps to recover the estate, for the agreement implied a promise by him to do so.<sup>b</sup>

In general, whenever the law imposes a duty or obligation, Legal obligation raises a promise to perform or to pay for the performance of such duty or obligation, for the breach of which assumpsit will lie. Where a carrier assents to deal with goods in a particular manner, a duty is imposed on him, on the receipt of such goods, to deal with them accordingly, and the law implies a promise by him to perform such duty.<sup>c</sup> Where a surgeon attended a sick person with the knowledge of the overseers, who did not repudiate his services, it was held that the latter were liable in assumpsit for the amount of the surgeon's bill; as they were under a legal obligation to supply the pauper with necessaries, and their not objecting to the surgeon attending implied an assent to accept his services.<sup>d</sup> Where a wife died in the absence of her husband, it was held that a person who voluntarily paid the expenses of her funeral (suitable to the rank and fortune of her husband) might maintain assumpsit against the husband for the sum so paid, for the husband was under a legal obligation to bury his wife.<sup>e</sup> And there are many cases of this sort, where a person having paid money which another was under a legal obligation to pay, though without his knowledge or request, may maintain an action to recover back the money so paid.<sup>f</sup> \*4

Assumpsit will lie for goods and chattels, as a fish, if there be a promise or a legal liability to pay it;<sup>g</sup>(1) or to recover the value of goods which should be rendered in specie for toll; but in such case the declaration must state the value.<sup>h</sup> Assumpsit will lie on an award, for a sum of money awarded, where the submission is not by deed; and it is immaterial that the submission be by rule of *nisi prius* or by a judge's order.<sup>i</sup> Assumpsit will lie on a promise by advertisement to give a reward to any person who will give information which will lead to the discovery of an offender; for it is a contract with any person

<sup>a</sup> Price v. Williams, 1 M. & W. 6. 1 Gale, 362. Wheeler v. Haydon, 2 Bulstr. 83.

<sup>b</sup> Edmunds v. Wilkinson, 7 C. & P. 387.

<sup>c</sup> Streeter v. Horlock, 1 Bing. 34. (8 Eng. C. L. 233.) 7 Moore, 283.

<sup>d</sup> Lamb v. Bounce, 4 M. & S. 275. Paynter v. Williams, 1 C. & M. 810. 3 Tyr. 894.

<sup>e</sup> Jenkins v. Tucker, 1 H. Bl. 90. Rogers v. Price, 3 Y. & J. 28.

<sup>f</sup> Per Lord Loughborough, C. J., in Jenkins v. Tucker, *supra*.

<sup>g</sup> The Earl of Falmouth v. Penrose, 6 B. & C. 385. (13 Eng. C. L. 205.)

<sup>h</sup> Bac. Ab. Tythe, Y. D. 2. B. N. P. 188. Chapman v. Gatcombe, 1 Hodges, 401.

<sup>i</sup> 2 Saund. 62. Bonner v. Charlton, 5 East, 139. Still v. Halford, 4 Camp. 19.

(1) (*Brewster v. Hobart*, 15 Pick. 302; and see *Willet v. Willet*, 3 Watts, 277.)



who performed the conditions mentioned in the advertisement;<sup>a</sup> and it is immaterial what motive may have induced the plaintiff to give the information.<sup>b</sup> Assumpsit is the proper remedy for a breach of promise of marriage, or upon an express warranty of the quality or goodness of personal chattels, or even upon an implied warranty as to the property therein.<sup>c</sup>

So assumpsit lies against carriers and other bailees for a neglect or other breach of duty.<sup>d</sup> So against a husband for necessities supplied to his wife.<sup>e</sup>

A party may waive a tort, and sue in assumpsit.

\*5

In many cases the law will raise a promise even from the *wrongful* acts of a party, and the plaintiff may waive the *tort* and sue in assumpsit.<sup>(1)</sup> Thus assumpsit will lie for money due for port duties, and for stallage, where there is a legal liability to pay, although there has not been an express contract, and although trespass would be sustainable.<sup>f</sup> So if a party entice <sup>a</sup>away or harbor an apprentice the master may waive the tort and sue in assumpsit for the work and labor of the apprentice.<sup>g</sup> So it has been held that assumpsit would lie for the value of goods which the defendant fraudulently induced the plaintiff to sell to an insolvent person, with a view to get possession of them for his own benefit, which purpose he effected; for the defendant could not set up as a defence the sale of the goods, which was induced by his own fraud, and the mere possession of them unaccounted for, was sufficient to raise an assumpsit.<sup>h</sup>

Many instances of this kind will be found under the heads *Money had and received*, and *Money paid, post*. It may here be observed, that whenever the plaintiff waives the tort and sues in assumpsit he adopts the acts of the defendant and affirms the contract, and he cannot afterwards treat him as a wrong-doer and sue him in tort.<sup>i</sup>

When the only remedy.

Assumpsit is the only remedy for the recovery of an instalment due on a simple contract debt, where the whole of a debt payable by instalments is not due.<sup>j</sup> So on a guarantee for the payment of the debt of a third person.<sup>k</sup> So it is the only remedy

<sup>a</sup> *Williams v. Carwardine*, 4 B. & Ad. 621. (24 Eng. C. L. 126.) See *Fallick v. Barber*, 1 M. & S. 108.

<sup>b</sup> *Id.*

<sup>c</sup> 2 Bl. Com. 451. 3 *id.* 160. 1 Ch. Pl. 102.

<sup>d</sup> See title *Carriers, post*. 1 Ch. Pl. 102. 1 Saund. 312.

<sup>e</sup> See title *Husband and Wife, post*.

<sup>f</sup> *The Mayor of Newport v. Saunders*, 3 B. & Ad. 411. (23 Eng. C. L. 108.) But see *the Mayor of Northampton v. Ward*, 1 Wils. 107.

<sup>g</sup> *Foster v. Stewart*, 3 M. & S. 191. *Lightly v. Clouston*, 1 Taunt. 112.

<sup>h</sup> *Hill v. Perrott*, 3 Taunt. 274.

<sup>i</sup> *Brewer v. Sparrow*, 7 B. & C. 310. (14 Eng. C. L. 50.) 1 M & R. 2.

<sup>j</sup> *Rudder v. Price*, 1 H. Bl. 547. 2 Saund. 303, n. 6. *Cooke v. Whorwood, id.* 337.

<sup>k</sup> *Hardr.* 486. Com. Dig. *Debt*, B. See title *Guarantees, post*.

(1) (Assumpsit may be maintained for the proceeds of a chattel, tortiously taken and converted into money. *Willet v. Willet*, 3 Watts, 277. *Gilmore v. Wilbur*, 12 Pick. 120. Some benefit must actually have accrued to the tortfeasor. *Webster v. Drinkwater*, 5 Greenleaf, 319. But see *Stockett v. Watkins' Adm.* 2 Gill & Johns. 343, where it is said to have been sustained in some instances where the chattel has not been parted with by the trespasser.)

for the payee or indorsee of a bill of exchange against the acceptor; or the indorsee of a promissory note against the maker.<sup>a</sup>

When a party has a security of a higher nature, as a bond Higher or other instrument under seal, or of record, he cannot maintain security. assumpsit in respect of the same subject matter, as the simple contract, on which alone assumpsit will lie, is merged in the higher security. The proper remedy being debt or covenant where the contract is under seal, or debt or *scire facias* if it be of record only.<sup>b</sup> But if a deed be given as a further or collateral security, and not intended to operate as an extinguishment <sup>\*6</sup> of a security previously existing, the creditor may maintain assumpsit on the latter, if it be a simple contract;<sup>c</sup> Collateral as where *A.* having the joint and several promissory notes of security. *B.* and *C.*, for a debt due to him from *B.*, procured a bill of sale of *B.*'s goods as a *further* security, held that *A.* was not thereby precluded from suing *B.* and *C.* on the note.<sup>d</sup> So the party may sue in assumpsit on the original contract where the deed is void or inoperative, as if an infant give a bond in a security is penalty for necessities, it will not extinguish the simple con- void. tract debt, for the bond is void.<sup>e</sup> So if an annuity deed be set aside for a defect in the memorial.<sup>f</sup> So if a bankrupt gives a bond in satisfaction of a simple contract debt, after a secret act of bankruptcy, it will not extinguish the debt.<sup>g</sup> So if the deed be executed by the plaintiff and not by the defendant the binding not being mutual.<sup>h</sup> So if the deed be given on usurious terms, as a security for money previously lent, but not tainted with usury, assumpsit will lie on the original contract.<sup>i</sup> So assumpsit lies for use and occupation, though there be an agreement by deed of lease, if it does not amount to an actual demise.<sup>j</sup>(1) So if a parol agreement be substituted for

<sup>a</sup> *Bishop v. Young*, 2 B. & P. 83.

<sup>b</sup> 1 Roll. Ab. 11, 517. Bac. Ab. *Debt*, G. *Shlencker v. Moxsy*, 3 B. & C. 789. (10 Eng. C. L. 227.) *Shack v. Anthony*, 1 M. & S. 575. *Leslie v. Wilson*, 6 Moore, 425. (7 Eng. C. L. 395.) *Toussaint v. Martinant*, 2 T. R. 100. *Atty v. Parish*, 1 N. R. 104.

<sup>c</sup> *Twopenny v. Young*, 3 B. & C. 208. (10 Eng. C. L. 54.) *Dean v. Newhall*, 8 T. R. 168. *Solly v. Forbes*, 2 B. & B. 38. (6 Eng. C. L. 11.) *Weston v. Foster*, 2 Bing. N. C. 693. (29 Eng. C. L. 457.)

<sup>d</sup> *Twopenny v. Young*, *supra*. The contract of a guarantee or surety under seal does not by operation of law extinguish the principal, per Lord Kenyon, C. J., in *Whyte v. Cuyler*, 6 T. R. 177.

<sup>e</sup> B. N. P. 182.

<sup>f</sup> *Scurfield v. Gowland*, 6 East, 241. *Waters v. Mansell*, 3 Taunt. 56.

<sup>g</sup> *Ambrose v. Clendon*, 2 Stra. 1042.

<sup>h</sup> *Sutherland v. Lishnan*, 3 Esp. 42.

<sup>i</sup> 1 Saund. 295, n. 1.

<sup>j</sup> *Elliott v. Rogers*, 4 Esp. 59.

(1) (*Little v. Martin*, 3 Wend. 219. *Williams v. Sherman*, 7 Wend. 109. It will not lie against one holding adversely. *Boston v. Binney*, 11 Pick. 1. *Richey v. Hinde*, 6 Ohio, 379. Nor for mesne profits after ejectment. *Butler v. Cowles*, 4 Ohio, 213. Nor where legal proceedings have been instituted to turn a tenant who holds over, out of possession. *Feather-stonchough v. Bradshaw*, 1 Wend. 134. It is not necessary that the defendant should have held possession the whole time laid in the declaration, if he became tenant by contract, and retained control of the property. *Grant v. Gill*, 2 Whart. 42.)

a contract under seal, *after* a breach of the latter, assumpsit will lie on the former.<sup>a</sup>(1)

Foreign judgment. So assumpsit will lie on the judgment of a foreign court, for it is not considered as a debt of record in this country;<sup>b</sup> or upon an Irish judgment,<sup>c</sup> or Scotch decree.<sup>d</sup>

\*7 Corporations. \*A corporation cannot sue in assumpsit on an executory contract, unless empowered by the act of incorporation;<sup>e</sup> but they may maintain assumpsit on an executed contract, as for use and occupation, where the tenant has held under them and paid rent.<sup>f</sup>

Assumpsit cannot be sustained against a corporation, because they cannot contract by parol,<sup>g</sup> except on bills of exchange and promissory notes, where the power of drawing and accepting them has been recognised by statute.<sup>h</sup>(2)

Assumpsit will lie against a corporation aggregate, without a head, on an executed parol contract.<sup>i</sup>

Various other instances besides those enumerated, in which assumpsit will lie, will be found under different titles in this work.

Consideration. A contract which will sustain assumpsit must be founded on a sufficient consideration; it must not be illegal, of an immoral tendency, or contrary to sound policy; for contracts in contravention of the statute or common law, or of public policy, or bottomed in fraud, cannot be the foundation of a civil action.

*Mala prohibita*, and formerly a distinction was made, in respect of contracts, between *mala prohibita*, and *mala in se*, yet that distinction has long since been exploded;<sup>j</sup>(3) and although it has been considered in some cases,<sup>k</sup> that where a statute contains no distinct

<sup>a</sup> *Heard v. Wadham*, 1 East, 630. But where there is a contract under seal, the parties cannot dispense by parol with the performance of any of the covenants in it, per lord Ellenborough, C. J., in *White v. Parkin*, 12 East, 584.

<sup>b</sup> *Bowles v. Bradshaw*, Doug. 4, and other cases there cited, per Lord Ellenborough, in *Hall v. Odber*, 11 East, 124. *Appleton v. Braybrook*, 6 M. & S. 34.

<sup>c</sup> *Harris v. Saunders*, 4 B. & C. 411. (10 Eng. C. L. 373.)

<sup>d</sup> *Douglas v. Forrest*, 4 Bing. 686. (15 Eng. C. L. 113.) 1 M. & P. 663.

<sup>e</sup> *East London Water Works Company v. Bailey*, 4 Bing. 283. (13 Eng. C. L. 435.) 12 Moore, 533.

<sup>f</sup> *Stafford v. Till*, 4 Bing. 75. (13 Eng. C. L. 347.) See *Mayor of Carmarthen v. Lewis*, 6 C. & P. 608. (25 Eng. C. L. 560.)

<sup>g</sup> 1 Rol. Rep. 82. *Slack v. Highgate Archway Co.*, 5 Taunt. 792. (1 Eng. C. L. 268.)

<sup>h</sup> *Murray v. East India Co.*, 5 B. & A. 204. (7 Eng. C. L. 66.)

<sup>i</sup> *Beverly v. Lincoln Gas Light Company*, MS. Q. B. T. T. 1837, 2 Nev. & Perr.

<sup>j</sup> Per Best, J., in *Bensley v. Bignold*, 5 B. & A. 341. (7 Eng. C. L. 122.) *Aubert v. Maze*, 2 B. & P. 374. *Collins v. Blantern*, 2 Wils. 351.

<sup>k</sup> *Gremare v. Le Clerc Bois Valon*, 2 Camp. 144, where Lord Ellenborough held that

(1) (*Munroe v. Perkins*, 9 Pick. 298.)

(2) (The ancient doctrine, that a corporation can act in matters of contract, only under its seal has been departed from by modern decisions. *Chesapeake and Ohio Canal Co. v. Knapp*, 9 Peters, 541. A promise may be implied on the part of a corporation, from the acts of its agent, whose powers are of a general character. *Abbot v. Hermon*, 7 Greenleaf, 118.)

(3) (*Pennington v. Townsend*, 7 Wend. 276.)

*prohibition*, but merely inflicts a *penalty* for doing a certain act, a contract having such act for its object was not void, and that the penalty was the only consequence that resulted from the transgression of the statute; it is now established, that where the provisions of an act of parliament have for their object the protection of the public, it makes no difference with reference to contracts, \*whether the thing be *prohibited absolutely*, or under a *penalty*.<sup>a</sup>(1) Every contract made for, or about, any matter or thing which is prohibited and made unlawful by any statute, is a void contract, although the statute itself doth not mention that it shall be so, but only inflicts a penalty on the defaulter, because a *penalty implies a prohibition*, though there are no prohibitory words in the statute.<sup>b</sup>

\*8

The Court of Exchequer have decided that the business of a banker is within the 57 Geo. III, c. 99, s. 3, which prohibits clergymen from engaging in trade, and avoids all contracts in which spiritual persons are parties; and therefore that a joint stock banking company in which a clergyman had shares could not maintain an action on a bill of exchange indorsed to them, against any of the parties thereto.<sup>c</sup>

A clergyman cannot be a banker.

A distinction, however, is observed in respect of statutes which have for their object the protection of the revenue *only*; the non-observance of excise regulations will not avoid a contract in respect of their subject matter, if it be not accompanied with fraud, although a penalty attaches.<sup>d</sup>

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an unlicensed surgeon might sue for his fees, though the 3 H. VIII. c. 11, subjected surgeons to a penalty for practising without a license. *Comyns v. Boyer*, Cro. Eliz. 485.

<sup>a</sup> Per Bayley, J., in *Bensley v. Bignold*, 5 B. & A. 340, (7 Eng. C. L. 122,) *post*, 11; per Lord Tenterden, C. J., in *Brown v. Duncan*, 10 B. & C. 98, (21 Eng. C. L. 31,) *post*. 18; per lord Eldon, C. J., in *Kemble v. Atkins*, Holt, 435. (3 Eng. C. L. 150.) *Coates v. Hatton*, 3 Stark. 61. (14 Eng. C. L. 163.)

<sup>b</sup> Per Holt, C. J., in *Bartlett v. Vinor*, Carth. 252; recognised by Tyndal, C. J., in *De Begnis v. Armistead*, 10 Bing. 107, (25 Eng. C. L. 47,) *post*; Ch. Con. 539.

<sup>c</sup> *Hall v. Franklin*, H. T. 1838. In consequence of this decision, a bill has been introduced into parliament to obviate the evils which might arise from a great number of clergymen having embarked in such companies.

<sup>d</sup> *Brown v. Duncan*, 10 B. & C. 93. (21 Eng. C. L. 29.) *Johnson v. Hudson*, 11 East, 180. *Hodgson v. Temple*, 5 Taunt. 181. (1 Eng. C. L. 67.)

(1) (Where a contract is founded on a transaction prohibited for the benefit of particular individuals, and has no influence on the public welfare, it is not absolutely void but only voidable by the party for whose benefit the prohibition is introduced. A noncompliance, therefore, with the act of congress which requires vessels crossing the Atlantic to have a certain quantity of water well secured under deck, does not render the voyage illegal so as to avoid the policy. *Warren v. Manufacturers' Ins. Co.*, 13 Pick. 518.)

## SECTION II.

## OF CONTRACTS IN CONTRAVENTION OF THE STATUTE LAW.

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\*9 1.—*Sale of spirituous liquors.*] THE 24 Geo. II, c. 40, s. 12. enacts “that no person whatsoever shall be entitled unto, or maintain any action, cause, or suit to recover, either in law or equity, any sum of money or demands whatsoever, on account of any spirituous liquors, unless such debt shall have really been and *bond fide* contracted, at one time to the amount of 20s. or upwards; nor shall any particular item in any account or demand for distilled spirituous liquors be allowed, where the liquors delivered at one \*time, and mentioned in such item, shall not amount to the full value of 20s. at the least, and that without fraud or covin, and where no part of the liquors so sold or delivered shall have been returned, or agreed to be returned, directly or indirectly.”

Sale of spirits to the keeper of an eating house.

In an action against the keeper of an eating-house, for a demand, which included items for liquors under 20s., which were had of the plaintiff as they were wanted, for the defendant's customers, Lord Kenyon held, that as the liquors were not sold to the defendant for his own consumption, but for the use of his guests resorting to his house in the way of trade, the case did not fall within the mischiefs intended to be remedied by the statute, the intent of which was to prohibit the sale of such small quantities to the *consumer*, and thereby prevent the pernicious effects of dram-drinking, which had been found extremely injurious to the lower orders of society.<sup>a</sup>

A tavern bill.

But in an action for a tavern bill, which contained an item of 8s. for spirituous liquors supplied to the defendant's guests at an entertainment at which he himself was not present, the court held that that item could not be recovered. Abbott, C. J.: “The words of the act are free from doubt; they contain a general and absolute prohibition of the sale of liquors, unless delivered in quantities amounting to more than 20s. in value at one time. We are, however, desired to narrow the construction, by introducing the qualifications of a sale to the consumer himself, and by confining it to the case where the spirits have been sold alone. But it would be a great evil to introduce such qualifications; and I think, if we did so, we should probably defeat the intentions of the legislature.”<sup>b</sup>

<sup>a</sup> Jackson v. Attrill, Peake, 180. S. N. P. 61.

<sup>b</sup> Burnyeat v. Hutchinson, 5 B. & A. 241. (7 Eng. C. L. 83.) This decision is ~~entirely~~ reconcileable with the preceding case. Assumpsit for goods sold and deli-

Where an officer in the army accepted a bill of exchange in Security payment of small quantities of spirits, under the value of 20s., for the supplied by a publican, to be used out of his house by recruits price of and others under the command of the acceptor, Lord Ellenbo- spirits. rough was of opinion that the act did not extend to invalidate \*10 a security so given.\* *But qu.*

But where a bill of exchange was given partly in considera- tion of spirituous liquors, sold in less quantities than 20s., and partly for money lent, the court held that it was wholly void. Sir. J. Mansfield, C. J.: "The statute does not in terms avoid the security, but it makes the consideration illegal, not merely void, and the security is entire and cannot be apportioned, and since it is partly for an illegal consideration, the whole bill is void."b

Upon the statement of an account arising out of cross de- mands, credit was given for the amount of spirits sold in quan- tities under the value of 20s. In an action for the balance, it was held that these items could not be disputed.\* And it has been held that the statute does not apply to cases where spirits are supplied to guests who are lodging in the house.d

2.—*Printing.*] The statute 28 Geo. III, c. 78, s. 2, enacts that no person shall print or publish a newspaper, until an affidavit be delivered at the stamp-office specifying the name and abode of the printer or publisher, and of the proprietor, &c.

In an action for work and labor, for printing a weekly newspaper, entitled the Military Register, held, that as the plaintiff had not lodged an affidavit at the stamp-office, in compliance with the statute, he could not recover.\* So where the plaintiff lodged an affidavit at the stamp-office, stating Printing newspapers. that he was printer and sole proprietor of a newspaper, called the Christian Advocate; held, in an action for work and labor for printing the same, against the defendants as proprietors, that he could not recover.

The statute 39 Geo. III, c. 79, s. 27, requires that every per- son \*who shall print any paper or book, which shall be intended to be published or dispersed, shall print upon the first and last leaves of such paper or book his name and the name of his place of residence.

In an action by the plaintiff, who was a printer, to recover a Name of the printer

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vered: it appeared that the defendant had run up a score for grog, beer, and herrings, at a public house kept by the plaintiff: held, that the charge for grog could not be re- covered. *Gilpin v. Rendle*, S. N. P. 61.

\* *Spencer v. Smith*, 3 Camp. 9.

b *Scott v. Gillmore*, 3 Taunt. 226. This decision was recognised and acted upon in *Gaitskill v. Greathead*, 1 D. & R. 359. (16 Eng. C. L. 42.) See *Fetherstone v. Hut- chinson*, Cro. Eliz. 199. *Shackell v. Rosier*, 2 Bing. N. C. 634. (29 Eng. C. L. 438.)

c *Dawson v. Remnant*, 6 Esp. 24. d *Proctor v. Nicholson*, 7 C. & P. 67.

e *Marchant v. Evans*, 8 Taunt. 142. (4 Eng. C. L. 50.) 2 Moore, 14. *Houston v. Mills*, 1 M. & Rob. 325.

f *Stephens v. Robinson*, 2 C. & J. 209.



sum for printing a pamphlet, part of the charge was for printing and part for paper. The pamphlet purported to be printed by another person, and not by the plaintiff. Held, that the omission of the plaintiff's name as printer was a direct violation of the statute, and that he could not recover. *Abbott, C. J.*, was of opinion that a party cannot be permitted to sue, either for work and labor done or for materials provided, where the whole combined forms one entire subject matter, made in direct violation of the provisions of an act of parliament.<sup>a</sup>

3.—*The treating act.*] The 7 & 8 W. III, c. 4, (the Treating Act) enacts that no person to be elected, &c. shall, before his election, directly or indirectly, give, present, or allow to any person having a vote in such election, any money, meat, drink, entertainment, or provision, or make any present, gift, reward, or entertainment, or shall at any time hereafter, make any promise, agreement, &c., to give or allow any money, meat, drink, provision, &c., to or for any such person, &c., in order to be elected or for being elected to serve in parliament for such county, city, &c.

Provi-  
sions fur-  
nished to  
voters.

\*12

In an action on a bill for provisions furnished to voters at the request of the defendants, consisting of three descriptions of charges, viz., 1st, for provisions furnished before the *teste* of the writ; 2dly, for provisions furnished after the *teste* of the writ to voters resident in the borough; 3dly, for provisions furnished to voters non-resident in the borough; the defendants paid into court sufficient to cover the charges of the first and last descriptions; held, that the plaintiff could not recover for the second description; for the contract was bottomed in *malum prohibitum* of a very serious nature in the opinion of the legislature. The legislature had drawn a strict line, which was \*not to be departed from; it said that after the *teste* of the writ, no meat or drink shall be given to the voters by the candidate; and that being the case, the court could not give any assistance to the plaintiff, consistently with the principles which had governed the courts of justice at all times.<sup>b</sup>

Though in the preceding case a sum was paid into court to cover the charge made for provisions supplied to non-resident voters; yet Eyre, C. J., said that the statute made no distinction between resident and non-resident voters. If any exception was to be allowed for voters non-resident, the whole mischief complained of in the act would necessarily follow. It would be impossible for the candidate to make a distinction between those voters who resided at a distance and those who lived within half a mile of the place of voting." And it was so held in a subsequent case.<sup>c</sup> A vacancy having been created in a borough by the death of one of its members, the defendant

<sup>a</sup> *Bensley v. Bignold*, 5 B. & A. 335. (7 Eng. C. L. 121.)

<sup>b</sup> *Ribbans v. Crickett*, 1 Bos. & Pul. 264.

<sup>c</sup> *Lofthouse v. Wharton*, 1 Campb. 550, n.

canvassed the voters on behalf of a friend, *without his knowledge*, and ordered beer to be distributed among them; held to be within the act, and that the plaintiff could not recover the price of the beer. Parke, J., said, that the provisions of the statute extended not only to candidates, whether successful or not, and their agents, but also "to any treating by any ways or means on his or their behalf," and though it did not appear that the defendant was an agent, yet he was treating on behalf of the candidate.<sup>a</sup> But in a subsequent case, where the defendants ordered refreshments for certain voters, Patteson, J., held that they were liable for the price, and that the act applied only to candidates and their agents.<sup>b</sup> If a mercer sells ribands, knowing that they are to be distributed among voters, he cannot recover the price of them.<sup>c</sup>

The act extends to all treating on behalf of the candidate.

Payment by a candidate of the expenses of taking out the freedom of voters, or of the travelling expenses of voters, is illegal.<sup>d</sup>

\*4.—*Other acts.*] The statute 17 Geo. III, c. 42, requires bricks for sale to be of certain dimensions therein specified. \*13 Where bricks under the statutable size were sold to the defendant, who did not know that they were under size, held that the seller could not recover the price of them, for the making and selling of such bricks was a fraud upon the statute, the policy of which was to protect the buyer against the fraud of the seller.<sup>e</sup>

Bricks under size  
The seller is  
fraudulent

The 47 Geo. III, c. 68, for the prevention of fraud in the vending and delivery of coals, requires that the vendor should deliver a ticket *signed by the meter, &c.*, containing a description of the coals, &c., to the purchaser, &c. Held, that a vendor of coals who had delivered a vendor's ticket to the purchaser, but *not signed by the meter*, could not recover the price of the coals from such purchaser; for the object of the legislature, in requiring the ticket to be signed by the meter, was, to protect the purchaser against the fraud of the seller. That being so, it fell within the principle of the preceding case.<sup>f</sup>

Vending coals.  
Not sufficient

By the 42 Geo. III, c. 38. s. 20, a brewer is prohibited from using any thing but malt and hops in the brewing of beer. Where the plaintiff, a druggist, sold and delivered drugs to the defendant, a brewer, *knowing that they were to be used in the brewery*, held, that he could not recover the price of them, for the court will not give sanction to a contract entered into against the policy of the law. If the plaintiff had not been cognisant of the use intended to be made of the drugs, he might have been entitled to recover; but if a principal sell articles in order

Selling drugs to a brewer.

<sup>a</sup> Ward v. Nanney, 3 C. & P. 399. (14 Eng. C. L. 369.)

<sup>b</sup> Hughes v. Marshall, 5 C. & P. 150. (24 Eng. C. L. 250.) 2 C. & J. 118.

<sup>c</sup> Richardson v. Webster, 3 C. & P. 128. (14 Eng. C. L. 238.)

<sup>d</sup> Baynton v. Cattle, 1 M. & Rob. 265. <sup>e</sup> Law v. Hodson, 11 East, 300.

<sup>f</sup> Little v. Pool, 9 B. & C. 192. (17 Eng. C. L. 355.)



to enable the vendee to use them for illegal purposes, he cannot recover the price.<sup>a</sup>

Packing  
butter.

in force here

\*14

By the 36 Geo. III, c. 86, entitled an act to prevent abuses and frauds in the packing, weight and sale of butter (s. 2,) every cooper or other person making a vessel for packing butter, is required to brand his Christian name and surname on such vessel, together with the exact weight or tare thereof, or in default thereof \*to forfeit for every such vessel not so marked 10s. By s. 3, every dairyman, farmer, &c., who shall pack butter for sale, &c., shall brand his name on different parts of the vessel, &c. Where a farmer sold butter in firkins not marked as prescribed by the act, the court held, on the authority of the preceding cases, that he could not recover the price of it.<sup>b</sup>

Pawn-  
brokers.

in force here

If parties enter into a contract of partnership in violation of the law, it is void, and will confer no right on either party as against the other. The existence of a *secret* partnership, in the pawnbroking business, is prohibited by the provisions of 39 & 40 Geo. III, c. 99, which requires that the parties carrying on the trade shall be known. Therefore, if parties enter into a contract to carry on the partnership, in such manner as to contravene the law, such contract is void.<sup>c</sup>

5.—*Sunday.*] The 29 Car. II, c. 7, s. 1, enacts, that no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, business, or work of their ordinary calling upon the Lord's day, or any part thereof, (works of necessity and charity only excepted,) &c.

It is difficult to reconcile the various decisions and *dicta* of judges respecting the validity of contracts entered into on the Lord's day.<sup>(1)</sup> The principle to be collected from them appears to be, that if any person enters into a contract which falls within his ordinary occupation or calling, on a Sunday, he cannot enforce it; but if a defendant knowingly enters into *such* a contract and thereby violates the Sabbath, he will not be allowed to take advantage of his own wrong as against an *innocent* plaintiff. Where both parties are in *pari delicto*, neither can recover.

Sale of  
horses on  
Sunday.

Where the vendor of a horse made a contract of sale on a *Sunday*, but not in the exercise of his ordinary calling, it was

<sup>a</sup> Langton v. Hughes, 1 M. & S. 593; see Lightfoot v. Tenant, 1 B. & P. 551, *post*. Cannan v. Bryce, 3 B. & A. 179, (5 Eng. C. L. 255,) *post*.

<sup>b</sup> Forster v. Taylor, 5 B. & Ad. 887. (27 Eng. C. L. 230.) In Tyson v. Thomas, M'Clell. & Younge, 119, which was an action for not delivering two hobbetts of barley, the court held that the plaintiff could not recover, as the contract was prohibited by 22 Car. II, c. 8, which subjected any person to a penalty of 40s. who sold or bought corn by any other measure than the Winchester bushel.

<sup>c</sup> Armstrong v. Lewis, in error, 2 C. & M. 274.

(1) (A note given on Sunday is void. If the contract which was the consideration of the note had been made on Saturday, the action must be on the contract. *Kepner v. Keifer*, 6 Watts, 231.)

held that \*he might recover the price.\* So when the plaintiff's son made a verbal agreement for a horse on a Sunday with a horse-dealer, and the horse was delivered to the plaintiff on the following Tuesday, when the price was paid; held, in an action for a breach of the warranty, that the contract was not complete until the delivery of the horse, therefore that there was no contract on the Sunday, and that the plaintiff might recover; but assuming that the contract was perfect on the *Sunday*, the defendant was the person offending within the meaning of the statute, by exercising his ordinary calling of a dealer in horses on a *Sunday*; and as the plaintiff was ignorant that the defendant was a horse-dealer, he could not be considered as *particeps criminis*, by knowingly concurring in aiding the defendant to offend the law; and that being so it was not competent to the defendant to set up his own breach of the law in answer to this action. It might be otherwise if the plaintiff knew on the Sunday that the defendant was a horse-dealer.<sup>b</sup> But where the plaintiff, who was a horse-dealer brought an action on the warranty of a horse which was bought on a Sunday, on which day the warranty was given, the court after much deliberation decided that he could not recover; for there could be no doubt that the purchase of a horse by a horse-dealer, was an exercise of the business of *his* ordinary calling, and every species of labor, business or work, whether public or private, in the ordinary calling of any person, was within the prohibition of the statute.<sup>c</sup> So where the plaintiff's agent, a factor, sold a quantity of nutmegs to the defendant on a Sunday, held that he could not recover the price of them, though it appeared that the factor had reluctantly consented, under the pressing importunity of the defendant, to deliver the goods on the Sunday. Park J., said, that "the words *worldly labor* cannot be confined to a man's ordinary calling, but applies to any business he may carry on."<sup>d</sup> Where a drover sold a heifer to the defendant on a Sunday, which he subsequently promised to pay for, held that as he kept the heifer, and afterwards promised to pay, he was liable for a *quantum meruit*, though not on the original \*contract or the price agreed upon on the Sunday.\*<sup>e</sup> In an action by the indorsee against the acceptor of a bill of exchange, which was *drawn* on a Sunday, but there was no evidence that it was accepted on that day, it was held that the plaintiff might recover; but the court said, that if it had been accepted on a Sunday, and done in the ordinary calling of the defendant, and the plaintiff was acquainted with that circumstance, when he took the bill, he would be precluded from recovering on it; but the defendant

Sale of  
other  
things.

\*16

Drawing  
a bill of  
exchange.

<sup>a</sup> Drury v. Defontaine, 1 Taunt. 131.

<sup>b</sup> Bloxsome v. Williams, 3 B. & C. 232. (10 Eng. C. L. 60.)

<sup>c</sup> Fennell v. Ridler, 5 B. & C. 406. (11 Eng. C. L. 261.)

<sup>d</sup> Smith v. Sparrow, 4 Bing. 84. (13 Eng. C. L. 351.)

<sup>e</sup> Williams v. Paul, 6 Bing. 653. (19 Eng. C. L. 192.)

- Stage-coach. would not be permitted to set up his own illegal act as a defence at the suit of an innocent holder of the bill.<sup>a</sup> Driving a stage-coach is not within the meaning of the act, therefore a contract to carry a passenger by such a vehicle on a Sunday is legal and may be enforced.<sup>b</sup>
- Hiring a servant. The hiring of a servant by a farmer, is not work or business within the act, nor is it a part of his ordinary calling, therefore it is no objection to the validity of such a contract, that it was entered into on a Sunday.<sup>c</sup>
- Attorney. An attorney entering into an agreement on a Sunday for the settlement of his client's affairs, and thereby rendering himself personally liable, is not a person exercising his ordinary calling within the meaning of the statute.<sup>d</sup>

6.—*Of Transactions in contravention of the Revenue Laws.*] The rule in respect of transactions which infringe on the revenue laws, appears to be that if an English subject enters into a contract, the subject matter of which is, *with his knowledge*, to be used in contravention of the laws of this country, he cannot enforce that contract; but the mere knowledge that the subject matter of the contract is to be so used, will not preclude a foreigner, from recovering upon it, provided the contract be completed abroad, and he does not take an active part in advancing that illegal purpose.

- Smuggling. Where the plaintiff, an English subject residing at Guernsey, sold brandy, which he packed up in a particular manner for the purpose of smuggling, held that as the contract was in contravention of the laws of England, and the seller was *particeps criminis*, \*he could not recover the price of the brandy.<sup>e</sup> So where the plaintiff, a foreign merchant residing at Lisle, sold lace to the defendants, which he *knew* was to be smuggled into England, and for that purpose *packed it in a peculiar manner* by their direction; held, that he could not maintain an action for the price of it; for as he undertook to deliver the goods in that manner, knowing the use intended to be made of them, he was offending against the laws of this country in the very contract itself.<sup>f</sup>

- \*17 Smuggling. But where the plaintiff, a foreigner, and an inhabitant of Dunkirk, sold tea to the defendant, knowing that it was to be smuggled by him into England, held, that he could maintain an action to recover the price of it; for the contract was legal, the delivery was completed at Dunkirk, and the plaintiff did not assist in the smuggling.<sup>g</sup> So where the plaintiff, a French

<sup>a</sup> Begbie v. Levi, 1 C. & J. 180.

<sup>b</sup> Sandiman v. Breach, 7 B. & C. 96. (14 Eng. C. L. 22.)

<sup>c</sup> R. v. Whitnash, 7 B. & B. 596. (14 Eng. C. L. 100.)

<sup>d</sup> Peate v. Dicken, 1 C. M. & R. 422. 5 Tyr. 116.

<sup>e</sup> Biggs v. Lawrence, 3 T. R. 454. Clugas v. Penaluna, 4 T. R. 466, S. P.

<sup>f</sup> Waymell v. Reid, 5 T. R. 599. Bernard v. Reed, 1 Esp. 91, S. P.

<sup>g</sup> Holman v. Johnson, Cowp. 341. In an action for not accounting for goods delivered to the master of a ship to be sold by him abroad, Lord Ellenborough held that it was no defence, that the goods were exported without paying duties, unless the evasion formed part of the contract. Catlin v. Bell, 4 Campb. 183.

merchant, sold goods which he knew were to be smuggled into England; per Lord Abinger: "A contract entered into by parties contravening the laws of their country cannot be enforced, but the subject of one country owes no deference to the revenue laws of another. To exclude a foreigner from the benefit of our laws, on the grounds that he has acted in violation of them, it must appear that he himself has taken some part in the contrivance to evade them. The utmost length to which the cases have gone is, that where a party has become an agent, as in packing goods in a particular form to assist the purchaser in an illegal purpose, he cannot recover. There is nothing illegal in a foreigner entering into a contract not opposed to morality, or the law of that country, though he may know that it is the intention of the purchaser to violate the laws of his country."<sup>a</sup>(1)

Where the object of an act of parliament is not the protection of the public, but of the revenue only, a violation of its provisions will not preclude a party from recovering on a contract \*respecting the excisable articles to which the act relates, if the contract be in itself legal and no infringement of the law be contemplated by it; as where four persons carried on trade in partnership as distillers, and one of them carried on business as a retail dealer in spirits, within two miles of the distillery, contrary to the 4 Geo. IV, c. 94, and his name was not inserted in the license, as required by the 6 Geo. IV, c. 81, s. 6; held, in an action on a guaranty for the due accounting of an agent to whom they had consigned spirits for sale, that the violation of the excise regulations by one of the partners (though with the knowledge of his co-partners) could not preclude them from recovering for the spirits which they sold, and consequently did not preclude them from recovering against the defendant; for there was no fraud on the part of the plaintiffs on the revenue; and the provisions of the acts of parliament relied upon, were not intended to protect purchasers, as was the case in *Law v. Hodgson*,<sup>b</sup> and in *Little v. Poole*;<sup>c</sup> and there was nothing illegal in the sale of the spirit.<sup>d</sup> So where the 6 Geo. IV, c. 80, ss. 115—117, enacted, that no spirits should be sent out of the stock of any distiller, rectifier, &c., without a permit specifying the strength of such spirits, &c., and a rectifier sent to the buyer spirits of the strength of twenty-seven and a half above proof, with a permit in which they were described as seventeen below proof, it was held that, though the irregularity of the permit

Violation  
of excise  
regula-  
tions.  
\*18

<sup>a</sup> *Pellecat v. Angell*, 1 Gale, 187. 2 C. M. & R. 311.

<sup>b</sup> *Ante*, 13.

<sup>c</sup> *Ante*, 13.

<sup>d</sup> *Brown v. Duncan*, 10 B. & C. 93. (21 Eng. C. L. 29.)

(1) (If one intend to aid another in an illegal object, he shall not be assisted by the law. A man is deemed to intend the thing he sells or makes shall be appropriated to its ordinary use. If that ordinary use be innocent, he is not chargeable with a subsequent misapplication: if it be illegal, he must be taken as intending the use and privy to the illegality. *Spurgeon v. McElwain*, 6 Ohio, 444.)

arose from the plaintiff's own fault, and was a violation of the law by him, it did not deprive him of the right of suing for the price of the spirits; as the contract was in itself legal, and as it contained no agreement either express or implied, that the law should be violated by such improper delivery.\*

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## \*SECTION III.

## CONTRACTS FOUNDED IN FRAUD.

It may be laid down as a general rule, that fraud vitiates all transactions; a contract, therefore, tainted with fraud, cannot be enforced in a court of justice, whether the object be to deceive the public, or third persons, or one of the parties thereto; for *ex dolo malo non oritur actio*.

Fraud on  
a third  
party.

Where *A.* succeeded *B.* in a house, and not being able to pay for the furniture, proposed to *D.* his friend to advance money for him, who accordingly treated with *B.*, and agreed to purchase the furniture for *A.* the defendant, at 70*l.*, which sum he paid *B.*, but there was a private agreement between *A.* and *B.*, that *A.* should pay a further sum of 30*l.*, over and above the 70*l.*; and in pursuance thereof he gave to *B.* two promissory notes of 15*l.* each, for that sum; held, that he could not recover on the notes, as the private agreement was a fraud upon *D.*, who had advanced the 70*l.* in confidence that it was the whole consideration.<sup>b</sup>

So where a surety gave a guaranty to *A.* for a certain amount of goods to be sold to *B.*, and the latter agreed to pay 10*s.* per ton beyond the market price, in liquidation of an old debt due to *A.*, without communicating the bargain to the

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\* *Wetherell v. Jones*, 3 B. & Ad. 221. (23 Eng. C. L. 58.) *Johnson v. Hudson*, 11 East, 180. *Hodgson v. Temple*, 5 Taunt. 181, (1 Eng. C. L. 67,) were much relied upon by the plaintiffs in the preceding cases. The former was an action to recover the price of tobacco consigned to the plaintiff from Guernsey, and sold by him to the defendant. The defence was that the plaintiff was not licensed to sell tobacco, but the court overruled the objection, observing that it was merely a breach of a revenue regulation, and they doubted whether the plaintiff, from a single instance, could be considered as a tobacco dealer within the meaning of 29 Geo. III, c. 68, s. 70. *Hodgson v. Temple* was an action for the price of spirits delivered to the defendant, Nicholas Temple, under a permit authorising the delivery to Richard Temple, at a distillery which was entered at the excise office as belonging to Richard, but which in fact was the property of the defendant, who also had a public house, contrary to 26 Geo. III, c. 7, s. 54. Held, that the plaintiff might recover. Mansfield, C. J.: "The mere selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment; to effect that, it is necessary that the vendor should share in the illegal transaction."

<sup>b</sup> *Jackson v. Duchaire*, 3 T. R. 551.

surety; held, that it was a fraud on the latter, and that the guaranty was void.<sup>a</sup>

Where a debtor was about to compound with his creditors for 11s. in the pound, one of whom refused to sign the deed of composition, unless the debtor gave him his note for the remaining 9s., and the debtor gave the note accordingly, unknown to the other creditors, who would not have \*signed the deed, if this particular creditor had not signed it; in an action on the note, the court held that he could not recover, for the note was given in *fraud* of the other creditors, who were parties to the contract by which their debts were to be cancelled, in consideration of receiving a composition. And this private engagement entered into between the plaintiff and defendant, prevented the latter being put into that situation which was the inducement to the other creditors to sign the deed and to relinquish a part of their demands. It affected the other creditors, by rendering abortive all that they had intended to do for the bankrupt, by compounding for their debts.<sup>b</sup>

Compounding with creditors.

\*20

Whenever one creditor is induced to agree to a composition, under the supposition that another creditor joins, if either of them depart from the agreement and be allowed to recover for the whole, a manifest fraud would be committed on the other.<sup>c</sup> Where a creditor compounded with his debtor under a false impression as to the extent of his estate, which the debtor fraudulently suppressed, it was held that the creditor was not estopped from suing for the balance of his debt.<sup>d</sup>

In an action by a brewer for beer delivered at a public house in the name and on the credit of the defendant, who was not the licensed keeper of the house, Lord Tenterden held that the plaintiff could not recover; for it was a *fraud* on the licensing system. The magistrates were vested with a discretion as to whom they should grant a license, and if any other person than the licensed keeper of a public house was to be made primarily liable for beer supplied to such house, it would be making such person the retailer in fact.<sup>e</sup>

Fraud on the licensing system.

Where the owner of an estate which was set up for sale by auction, employed two persons to bid as puffers, Lord Tenterden \*held, that even if only one such person was so employed,

Puffing at auctions.

\*21

<sup>a</sup> *Pidcock v. Bishop*, 3 B. & C. 605. (10 Eng. C. L. 197.) A contract which is a fraud on a third person may on that account be void as to the parties to it, per Bayley, J., *id.*

<sup>b</sup> *Cockshott v. Bennett*, 2 T. R. 763. The general principle is that a secret agreement of this kind made between the insolvent and some of the creditors, in order to induce the rest of the creditors to agree to the composition, is void, per Buller, J. *Jackson v. Lomas*, 4 T. R. 170. See also *Leicester v. Rose*, 4 East, 372, where such an agreement was held void, though the effect of it was not to secure more money to the plaintiff than to other creditors, but only further security for the same sum; as to the same point see *Wells v. Girling*, 1 Brod. & Bing. 447, 8. (5 Eng. C. L. 142.)

<sup>c</sup> 2 Saund. 137, *c. n.*

<sup>d</sup> *Wood v. Roberts*, 2 Stark. 417. (3 Eng. C. L. 411.) 2 Saund. 5 ed. 137, *f.*

<sup>e</sup> *Vine v. Mitchell*, 1 M. & Rob. 337.

<sup>f</sup> *Meux v. Humphries*, 1 M. & M. 132. 3 C. & P. 79. (14 Eng. C. L. 215.)



and though he was only to bid a certain sum, unless it was announced at the time that such person was bidding for the owner, the contract would not be binding on the purchaser.<sup>a</sup>

In an action on an agreement whereby the defendant undertook to pay 30% to the plaintiff, who was a bankrupt, if he should persuade his assignees to sell him a house of his at a certain sum, Lord Tenterden held that the contract was void, even though the assignees consented, for it was a *fraud* on the remainder of the creditors—a communication of the agreement to all the creditors might make a difference.<sup>b</sup>

In an action for the price of a picture by Claude, which the defendant purchased of the plaintiff's agent, who had refused to disclose his principal, but knowingly suffered the defendant to buy it under the impression that it had been in the possession of a man of distinction, held that the contract of sale was void on the ground of fraud, even though proved to be a real Claude.<sup>c</sup> If goods are fraudulently over-valued in a policy of insurance, with intent to cheat the underwriter, the contract is entirely vitiated, and the assured cannot recover even for the value actually on board.<sup>d</sup>

But if a party be induced to purchase an article by fraudulent representations of the seller respecting it, and after discovering the fraud, continue to deal with the article as his own, he cannot recover back the money from the seller, and having once forfeited his right to repudiate the contract by using the article after the discovery of the fraud, such right cannot be revived by the discovery of a new incident in the fraud.<sup>e</sup>

#### SECTION IV.

##### OF CONTRACTS IN FURTHERANCE OF IMMORALITY.

THE courts of law will not lend their aid to enforce a demand arising from an agreement in furtherance of immorality; for *ex turpi causa non oritur actio*.

\*22      \*In an action for use and occupation of a lodging the defence  
Contracts in furtherance of prostitution.      was, that the defendant was an infant and a prostitute. The chief justice was of opinion that those circumstances were no bar to the action, as both an infant and a prostitute must have lodging; but it being shown that the lodging was let to the de-

<sup>a</sup> *Wheeler v. Collier*, M. & M. 125. (22 Eng. C. L. 266.) See *Crowder v. Austin*, 3 Bing. 368, (13 Eng. C. L. 11,) S. P. *Howard v. Castle*, 6 T. R. 642.

<sup>b</sup> *M'Shane v. Gill*, 1 C. & P. 149. (11 Eng. C. L. 350.)

<sup>c</sup> *Hill v. Gray*, 1 Stark. 434. (2 Eng. C. L. 459.)

<sup>d</sup> *Haigh v. De La Cour*, 3 Camp. 319.

<sup>e</sup> *Campbell v. Fleming*, 1 Ad. & Ell. 42. (28 Eng. C. L. 29.)

defendant for the purpose of prostitution, and with a knowledge on the part of the plaintiff of that fact, he held that the action was not maintainable.<sup>a</sup> And so it was determined by Lord Tenterden in *Appleton v. Campbell*,<sup>b</sup> who added, "that if the defendant had received her visitors elsewhere, the plaintiff might recover." So in an action for board and lodging, where it appeared that the plaintiff kept a house of bad fame, and besides what she received for the board and lodging of the unfortunate women who lived with her, partook of the profits of their prostitution, Lord Kenyon declared that such a demand could not be heard in a court of justice.<sup>c</sup> But in an action against a female of this description for a washerwoman's bill, where it appeared that the articles washed consisted principally of expensive dresses and gentlemens' night caps, and that the plaintiff had full knowledge of the defendant's situation, the court held that the plaintiff might recover. Buller, J.: "The unfortunate woman must have clean linen, and it is impossible for the court to take into consideration which of those articles were used by the defendant to an improper purpose and which were not." So in an action for clothes supplied to the defendant, whom the plaintiff knew to be a woman of the town, Lord Ellenborough said, that it must not only be shown that the plaintiff had notice of this, but that he expected to be paid from the profits of the defendant's prostitution, and that he sold the clothes to enable her to carry it on, so that he might appear to have done something in furtherance of it.<sup>d</sup>

On the same principle, it has been held that an action would not lie for the price of libellous prints having an immoral tendency.<sup>e</sup> So the printer of an immoral and libellous book cannot maintain an action for his bill against the publisher who employed him.<sup>f</sup>

Immoral  
publica-  
tions.

\*23

## SECTION V.

### OF CONTRACTS AGAINST PUBLIC POLICY.

In general, contracts against public policy, or the policy of the law, are illegal. Agreements, therefore, for the sale of

<sup>a</sup> *Crisp v. Churchill*, cited 1 B. & P. 340. Sel. N. P. 68.

<sup>b</sup> 2 C. & P. 347. (12 Eng. C. L. 162.) *Girardy v. Richardson*, 1 Esp. 13, S. P. *Howard v. Hodges*, Sel. N. P. 60. 1 Campb. 350, n. *Jennings v. Throgmorton*, R. & M. 251, (21 Eng. C. L. 430,) S. P.

<sup>c</sup> *Lloyd v. Johnson*, 1 Bos. & P. 340.

<sup>d</sup> *Bowry v. Bennet*, 1 Campb. 348.

<sup>e</sup> *Fores v. Johnes*, 4 Esp. 97.

<sup>f</sup> *Poplett v. Stockdale*, R. & M. 337. (12 Eng. C. L. 87.) See *Stockdale v. Onwhyn*, 5 B. & C. 172, (11 Eng. C. L. 191,) where it was held that the first publisher of an immoral book could not maintain an action against a person for publishing a pirated edition of it.



public offices, or which tend to the obstruction or hindrance of public justice, or in restraint of trade, are void and cannot be enforced.

**Indemnity from the consequences of a crime.** A contract may not be prohibited by any positive law, nor adjudged illegal by any precedents, yet it may be decided to be so upon principle.<sup>a</sup> Where the plaintiff, at the instance of the defendant, published a libel, in consequence of a promise by the defendant to indemnify him, and defended an action brought for such publication, the plaintiff having brought an action against the defendant for the expenses which he thereby incurred; it was held that the action was not maintainable, for both the promise and the consideration were illegal; the consideration was the publication of a libel, and the promise was to indemnify the plaintiff from all the consequences of his crime; and a promise to indemnify a man against all the consequences of an offence cannot be supported on any principle of law.<sup>b</sup> There is no distinction between considerations void by statute and such as are void at common law.<sup>c</sup>(1)

**Sale of public offices.** *A.* being possessed of an office in a dock-yard, *B.*, in order to induce him to procure himself to be superannuated and retire on a pension, undertook, (without the knowledge of the Navy Board, to whom the appointment belonged,) in case *B.* should succeed him, to allow him a certain annual share of the profits of the office; held, that though *B.* was appointed, *A.* could not maintain an action on this agreement, for if the representations on which the plaintiff procured himself to be superannuated were true, it formed no ground of bargain with the defendant; if false, the public were deceived and the pension misapplied. Had the transaction passed with the knowledge of the Admiralty, judging of the case, and applying at their discretion the allowance they are bound to make, the ground of deceit on the public would have been done away.<sup>d</sup> So where *A.*, being appointed a custom-house officer through the interest of *B.*, had previously signed an agreement declaring that his name was used in the application in trust for *B.*, that he would appoint such deputies as *B.* would nominate and would empower *B.* to receive the profits of the office to his own use; held, that an action would not lie upon this agreement, for the effect of it was, that to all profitable purposes and as to all the exercise of the office, except as to signing a receipt for the salary, *B.* was the real officer, but was not accountable for the due execution of it; he might enjoy it without being subject to the restraints imposed by law on such

<sup>a</sup> Per lord Mansfield, C. J., in *Jones v. Randall*, Cowp. 38.

<sup>b</sup> *Shackell v. Rosier*, 2 Bing. N. C. 634. (29 Eng. C. L. 438.) *Colburn v. Patmore*, 1 C. M. & R. 88.

<sup>c</sup> Per Tyndal, C. J., 2 Bing. N. C. 646. (29 Eng. C. L. 443.)

<sup>d</sup> *Parsons v. Thompson*, 1 H. Bl. 322.

(1) (A promise to indemnify a public officer, from the consequences of a neglect of duty is void. *Heddon v. Wilkins*, 7 Greenleaf, 113.)

officers. The public were abused and the king deceived in the application. The contract was void on the principles of the common law, and contrary to the statutes 12 Rich. II, c. 2, and 5 & 6 Edw. VI, c. 16.<sup>a</sup> So where the owner of a ship employed in the East India Company's service, sold the command of the ship without the knowledge of the Company; held, that the contract was illegal; for the East India Company was a limb of the government of this country, and public policy required that there should be no money consideration for the appointment to an office in which the public were interested. Besides, the contract was a fraud on the East India Company, it being contrary to their regulations.<sup>b</sup>

Where a bankrupt under examination was charged with having received divers sums of money, which he had not accounted for, and the defendant, a friend of his, in consideration that the assignees would forbear to examine the bankrupt touching such sums, undertook to pay them; held, that no action could be maintained on such agreement; first, because it was contrary to the policy of the bankrupt laws; secondly, because the plaintiffs had no power to carry the agreement into effect, for no collusion of the assignees could deprive the creditors of the right of examination, which the commissioners would procure them. If the creditors had been called together, and they had consented to the agreement, it might have altered the case.<sup>c</sup> So where *A*, an insolvent, having been brought up before the court for the relief of insolvent debtors, to be examined on his petition, was opposed by *B.*, a creditor, and remanded to a future day. Before that day arrived, *C.*, who acted as the attorney of *A.*, in consideration of *B.*'s withdrawing his opposition to *A.*'s discharge, undertook that *B.* should be the sole assignee of *A.*'s estate, and should receive 100*l.* out of it within three weeks from his appointment; held, that this agreement was contrary to the policy of the insolvent act, and therefore void. For a measure of this kind takes from the commissioners that superintendence, control, and power of imprisonment for a time, which the legislature intended to vest in them; and, consequently, deprives the other creditors of the benefit of that full disclosure voluntarily and freely to be made, which they were entitled to have. Such bargaining might give protection to fraudulent concealment, to the great prejudice of creditors, it was, therefore, contrary to the policy of the law.<sup>d</sup> A security given by

Contracts  
against  
the policy  
of the  
bankrupt  
laws.

\*25

<sup>a</sup> Garforth v. Fearon, 1 H. Bl. 327. See further as to this point, Layng v. Payne, Willes, 571.

<sup>b</sup> Blachford v. Preston, 8 T. R. 89. See Card v. Hope, 2 B. & C. 661. (9 Eng. C. L. 209.) Richardson v. Mellish, 2 Bing 239. (9 Eng. C. L. 391.)

<sup>c</sup> Nerot v. Wallace, 3 T. R. 17. See Kaye v. Bolton, 6 T. R. 124, where a covenant by a friend of the bankrupt to pay all the creditors their full debts in consideration that they should not proceed further in the commission, was held valid.

<sup>d</sup> Murray v. Reeves, 8 B. & C. 421. (15 Eng. C. L. 254.)

an insolvent to a creditor to induce him not to oppose his discharge under the insolvent debtors' act, is void.<sup>a</sup>

Bill of exchange by a bankrupt for abandoning a fiat void.

\*26

It has been held that an agreement between a petitioning creditor, who had sued out a *fiat* in bankruptcy, and the bankrupt, that the former should abandon the prosecution of the fiat, and that the bankrupt should accept a bill of exchange for a certain amount, was illegal, even as between the bankrupt and the petitioning creditor, and that the bill of exchange accepted by the bankrupt in pursuance of such agreement, was void; and that no action could be maintained upon it, on the ground of its being an abuse of a process which a creditor has a right to sue out, not for his own benefit only, but for that of the other creditors also.<sup>b</sup>

The courts will not try actions on wagers, which are contrary to public policy, or may lead to an indecent investigation, or expose a third party to inconvenience, or which are otherwise illegal.

Wagers.

Thus a wager on the amount of hop duties, or other branch of the public revenue;<sup>c</sup> on the market price of goods upon a future day;<sup>d</sup> on the question of war or peace;<sup>e</sup> on the event of an election to serve in parliament;<sup>f</sup> on the life of a foreign potentate (Buonaparte) at war with this country;<sup>g</sup> upon a boxing or wrestling match, or other fight;<sup>h</sup> or as to the mode of playing an illegal game;<sup>i</sup> cannot form the foundation of an action in a court of justice, because such wagers are impolitic, and of an immoral tendency; and calculated to produce mischievous consequences.

So a wager of fifty guineas, that the plaintiff would not marry within six years, has been held to be illegal, as being in restraint of marriage.<sup>j</sup> So a wager as to the sex of a third person:<sup>k</sup> or whether an unmarried woman (Joanna Southcoat) would have a male child by a certain day, were held to be illegal, as unnecessarily leading to painful and indecent investigation.<sup>l</sup> The court will not try an action upon a wager, on an abstract question of law or judicial practice, in which the parties have no interest.<sup>m</sup> A wager relating to the value of

<sup>a</sup> Rogers v. Kingston, 2 Bing. 441. (9 Eng. C. L. 472.)

<sup>b</sup> Davis v. Holding, 1 M. & W. 159.

<sup>c</sup> Atherfold v. Beard, 2 T. R. 610. Shirley v. Sankey, 2 B. & P. 130.

<sup>d</sup> Hilberds v. Pittipiere. Wardle v. Fowler, Ch. Con. 395. Com. contr. 58. Bryan v. Lewis, R. & M. 386. (21 Eng. C. L. 467.)

<sup>e</sup> Allen v. Hearn, 1 T. R. 57. Busk v. Walsh, 4 Taunt. 290. <sup>f</sup> Id.

<sup>g</sup> Gilbert v. Sykes, 16 East, 150.

<sup>h</sup> Egerton v. Furzeman, 1 C. & P. 613. (11 Eng. C. L. 497.) Kenneday v. Gad, M. & M. 225. 3 C. & P. 376. (14 Eng. C. L. 356.) Squires v. Whiskin, 3 Camp. 149.—A cock fight. Hunt v. Bell, 1 Bing. 1. (8 Eng. C. L. 219.) 7 Moore, 212.—A sparring match.

<sup>i</sup> Brown & Leeson, 2 H. Bl. 43.

<sup>j</sup> Hartley v. Rice, 10 East, 22. Baker v. White, 2 Ver. 215. 2 Atk. 540. Lowe v. Peers, 4 Burr. 2233.

<sup>k</sup> De Costa v. Jones, Cowp. 729.

<sup>l</sup> Ditchburn v. Goldsmith, 4 Camp. 152.

<sup>m</sup> Henkin v. Guerres, 12 East, 247. 2 Camp. 408. A wager on the event of an

foreign funds is not illegal, and therefore may become the subject of an action of *assumpsit*.<sup>a</sup> As to this subject see further title *Gaming*.

\*SECTION VI.

\*27

THE CONSIDERATION.

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1.—*What is a sufficient consideration.*] A CONTRACT, to sustain *assumpsit*, must be founded upon a sufficient consideration. We shall here consider what consideration is sufficient to support this action.

Any act of the plaintiff, from which the defendant or a stranger derives a benefit or advantage; or any labor, detriment, inconvenience, suspension, or forbearance of his right, or any possibility of a loss, occasioned to the plaintiff, is a sufficient consideration to support a promise, if such act is performed or such inconvenience suffered by the plaintiff, with the consent, express or implied, or, in the language of pleading, at the *special instance and request* of the defendant; although no actual benefit accrues to the latter.<sup>b</sup> It is not essential that the consideration should be *adequate* in point of value, the law having no means of deciding upon this matter, provided there be no incompetency to contract, and the agreement violate no rule of law. “If there be *any* consideration, the court will not weigh the extent of it.”<sup>c</sup>(1)

appeal to the House of Lords from the Court of Chancery has been held good; the parties not having it in their power to bias the decision. *Jones v. Randall*, Cowp. 37. So has a wager whether Charles Stuart would be king within a certain time. *Andrews v. Herne*, 1 Lev. 33. And so has a wager between two sons on their fathers' lives. *Lord March v. Pigott*, 5 Burr. 2802. But it is evident that such wagers could not be sustained at this day. See the observations of the court respecting these cases in *Gilbert v. Sykes*, 16 East, 158, *et seq.*, where Le Blanc, J., says, “It has often been lamented that actions upon idle wagers should have ever been entertained in courts of justice. The practice seems to have prevailed before that full consideration of the subject which has been had in modern times. But it is now clearly settled that the subject-matter of a wager must at least be perfectly innocent in itself, and not tending to immorality or impolicy.”

<sup>a</sup> *Morgan v. Pebrer*, 3 Bing. N. C. 457. 3 Hodges, 8, *post*, 1547.

<sup>b</sup> 1 Saund. 211, c. 2 *id.* 137, c, 5th ed.

<sup>c</sup> Per Lord Ellenborough, C. J., in *Phillips v. Bateman*, 16 East, 372. Even in

(1) (A mere executory contract cannot be supported on the consideration of blood or natural affection. *Pennington v. Gitting's Ex'r.*, 2 Gill & Johns. 209.)

A promise by a bankrupt to pay to the plaintiff a debt which he owes him, provided he proves it against his estate, will not support assumpsit; for as the bankrupt is not liable to pay the debt, there is no consideration for the promise.<sup>a</sup>

- \*28 \*Any *slight* benefit, therefore, conferred by the plaintiff on the defendant, or on a third person at his request, or any inconvenience, risk, or obligation incurred by the plaintiff, at the request of the defendant, will be sufficient to support assumpsit. The consideration, however, must not, as we have seen,<sup>b</sup> be illegal, or of an immoral nature, or contravene public policy, or the policy of the law; and it must be such, as the party undertaking has a power by law to perform or cause to be performed.<sup>c</sup>

Giving a bond of indemnity in case of a lost bill. Where the declaration stated that the defendant was indebted to the plaintiff on a bill of exchange, and that the plaintiff having lost the bill, had, at the defendant's request, given him a bond of indemnity, upon which the defendant promised to pay the amount of the bill; held, a sufficient consideration to support such promise, for the giving of the bond was a disadvantage to the plaintiff.<sup>d</sup> So, where the defendant, in order to facilitate the making of an agreement, for which there was a sufficient consideration between the plaintiff and a third person, became a party thereto, held that, though the defendant derived no advantage from it, as the plaintiff would not have entered into it unless the defendant had acceded, there was a sufficient consideration to maintain an action.<sup>e</sup> The merely giving leave of absence to a soldier, at the instance of a third person, has been held to be a good consideration for a promise by the latter to the captain, who gave such permission, that the soldier should return in ten days, or that the promiser should pay the captain 20*l*.<sup>f</sup> A woman, after the death of her husband, promised a creditor that if he would prove that her husband had owed him 20*s*.; she would pay it, held a sufficient consideration, \*because it was a trouble and a charge to the creditor to prove his debt.<sup>g</sup> Giving up a bill of exchange to a party who is not liable to be sued on it, is a sufficient consideration for a promise.<sup>h</sup>

Party to an agreement.

Giving leave of absence.

\*29 Proving a debt.

A promise to receive as a partner.

Where the declaration stated that the plaintiff had been promised the command of a ship, an appointment of great value, that in consideration he would relinquish this appointment, the defendant undertook that the plaintiff should be received as a

equity, although a consideration is necessary if the agreement be not under seal, *inadequacy* of consideration or value is in general of itself no ground for impeaching a contract. But if the folly of the contract be extremely gross, it may tend to establish a case for relief on the ground of fraud. But *mere folly*, or *weakness*, or want of judgment, will not defeat a contract, even in equity. Ch. Con. 26. *Milnes v. Cowley*, 8 Price, 620. *Cole v. Trecothick*, 9 Ves. 246. *Western v. Russell*, 3 V. & B. 187.

<sup>a</sup> *Brealey v. Andrew*, 2 N. & Perr. 84.

<sup>b</sup> *Ante*, 7. <sup>c</sup> *Post*, 40.

<sup>d</sup> *Williamson v. Clements*, 1 Taunt. 523.

<sup>e</sup> *Baily v. Croft*, 4 Taunt. 611.

<sup>f</sup> *Taylor v. Jones*, 1 Lord Raym. 312.

<sup>g</sup> 1 Sid. 57.

<sup>h</sup> *King v. Sears*, 1 Gale, 241. 2 C. M. & R. 48.

partner in trade, and have one fourth share of the profits, in a firm of which the defendant was a member, held, a sufficient consideration to support the promise, though the other partners were unacquainted with the agreement, and though the defendant could not receive the plaintiff into partnership without their consent; for the defendant ought not to have entered into the engagement, unless he had secured the consent of his partners, or was willing to incur the consequence.<sup>a</sup> Where the defendant receives a benefit by the permission of the plaintiff, though the latter sustains no prejudice thereby, it is a sufficient consideration for a promise.<sup>b</sup> Where the declaration stated, that in consideration that the plaintiff, at the request of the defendant, had given to the defendant a letter written by O., since deceased, by means of which the defendant determined some controversies, and obtained a large portion of O.'s effects, the defendant promised the plaintiff 1,000*l.*, held a sufficient consideration. It was a gift on a mutual consideration.<sup>c</sup> The plaintiff having given the defendant promissory notes and a cognovit as a composition for certain claims, the defendant in consideration of the money so secured to be paid, engaged to indemnify the plaintiff against certain liabilities; held, that the security, and not the actual payment was the consideration, and that the plaintiff might sue on the guarantee, though he had not paid the amount of the security.<sup>d</sup> Giving security.

Where A. by public advertisement stated that whoever would give information which would lead to the discovery of the "murder of B. should, on conviction, receive a reward of 20*l.*, held that C. who gave such information, was entitled to recover the 20*l.* though she was induced to inform, not by the proffered reward, but by other motives; for the contract was with any person who performed the condition mentioned in the advertisement, and the court could not go into the plaintiff's motives.<sup>e</sup> Advertis- ing a re- ward. \*30

Where an action has been commenced for an *unliquidated* demand, payment by the defendant of an agreed sum in discharge of such demand, is a good consideration for a promise by the plaintiff to stay proceedings and pay his own costs.<sup>f</sup> So if an action be brought on a *quantum meruit*, and the defendant agree to pay a less sum than the demand in full, it is a good consideration for the defendant to pay his own costs and proceed no further.<sup>g</sup> So in case even of a *liquidated demand* or *admitted sum*, if the promise be such as the court would A promise to stay proceedings on receiving less than the demand.

<sup>a</sup> N'Neill v. Reed, 9 Bing. 68. (23 Eng. C. L. 265.)

<sup>b</sup> Davis v. Morgan, 4 B. & C. 8. (10 Eng. C. L. 262.)

<sup>c</sup> Wilkinson v. Oliveera, 1 Bing. N. C. 490. (27 Eng. C. L. 468.) 1 Scott, 461.

<sup>d</sup> Ikin v. Brook, 1 B. & Ad. 124. (20 Eng. C. L. 357.)

<sup>e</sup> Williams v. Carwardine, 4 B. & Ad. 621. (24 Eng. C. L. 126.)

<sup>f</sup> Wilkinson v. Byers, 1 Ad. & Ell. 106. (28 Eng. C. L. 48.)

<sup>g</sup> Per Parke, J., *id.* 113.



enforce, by restraining the plaintiff from proceeding contrary to the terms entered into.<sup>a</sup>(1)

**Assign-  
ment of a  
debt.** The assignment of a debt, even of an uncertain amount, due from a third person, is a sufficient consideration.<sup>b</sup> So is the release of an equity of redemption.<sup>c</sup> So is the assignment

**Giving up  
a suit  
where the  
law is  
doubtful.** of a chose in action.<sup>d</sup>(2) So the giving up a suit instituted to try a question respecting which the law was doubtful, there being contrary decisions on the point, has been held to be a sufficient consideration for a promise to pay a stipulated sum.<sup>e</sup>(3) Where stock belonging to the plaintiffs was transferred under a forged power of attorney, and the bank offered to replace the stock if the plaintiffs would first prove the amount under a commission of bankruptcy issued against the firm of which the forger was a member, and the plaintiffs subsequently received a dividend, and engaged to tender proof of their demand under the commission; held, that as it was a

\* 31 question of great difficulty at the \*time that the offer was made, whether the bank was liable to make good the loss, the engagement of the bank to replace the stock without any litigation, was a sufficient consideration to support a promise by the plaintiffs, that they would endeavor to enforce their demand before the commission, and that the plaintiffs could not sue the bank until they had performed their promise.<sup>f</sup> An occupier of lands having been sued with others by the vicar for tithes, gave up the occupation, and quitted the parish during the progress of the suit; upon which the defendant, a landholder in the parish, undertook to indemnify him from all costs if he would permit the defendant to defend the suit in his name; held, a sufficient consideration for the defendant's promise.<sup>g</sup>

**Promise  
to indem-  
nify.**

2.—*Forbearance.*] Forbearance of a suit for a well founded claim, is a sufficient consideration to support a promise.

**Giving  
time.** Where a receiver appointed by the Court of Chancery brought an action against *E.*, for a debt due to *F.*, whose estate he was empowered to collect, and the defendant in consideration that he would give *F.* time for payment, promised to pay him in case of *F.*'s default; held, on a motion in arrest of

<sup>a</sup> Per Littledale, J., *id.* 112, *dubitante tamen* Patteson, J.

<sup>b</sup> Mouldsdale v. Birchall, 2 Bl. 820.

<sup>c</sup> Thorpe v. Thorpe, 1 Lord Raym. 662.

<sup>d</sup> Per Bayley, J., in Price v. Seaman, 4 B. & C. 528. (10 Eng. C. L. 401.)

<sup>e</sup> Longridge v. Dorville, 5 B. & A. 117. (7 Eng. C. L. 43.)

<sup>f</sup> Stracey v. The Bank of England, 6 Bing. 754. (19 Eng. C. L. 224.) 4 M. & P. 639.

<sup>g</sup> Adams v. Dansey, 6 Bing. 506. (19 Eng. C. L. 149.)

(1) (A mere agreement to accept less than the real debt is a *nudum pactum*. *Geiser v. Kershner*, 4 Gill & Johns. 305. A partial payment of a debt due is no consideration for a promise to wait for the residue another year. *Mason v. Peters*, 4 Verm. 101.)

(2) (*Tiernan v. Jackson*, 5 Peters, 580. *Hind v. Holdship*, 2 Watts, 104. *Moar v. Wright*, 1 Verm. 57. *Bucklin v. Ward*, 7 Verm. 195. Assumpsit will not lie by the assignee of a bond, except on an express promise. Recognition of his right is not sufficient. *Dubois v. Doubleday*, 9 Wend. 317.)

(3) (*Brown v. Sloan*, 6 Watts, 421.)

judgment, a sufficient consideration; for the plaintiff as receiver had authority to forbear proceedings against the debtor, and it was a contract from which he might incur a detriment. By giving time the plaintiff incurred a responsibility, and that was a sufficient detriment to form a consideration for a promise.<sup>a</sup> So a forbearance by the plaintiff at the defendant's request to enforce a *fieri facias* against the goods of a third person, for 60*l.* has been holden to be a valid consideration for the defendant's promise to pay the plaintiff 107*l.* in seven days. *Per* Lord Tenterden, C. J., "if the inconvenience of an execution against those goods, at the time in question, was so great that the defendant thought it proper to buy it off at such an expense, I do not see that the consideration is insufficient for the promise, though perhaps the plaintiff might not be entitled to recover to the full extent of 107*l.*""<sup>b</sup>

Not to enforce a *fieri facias*.

\*32

Where a clerk, employed by the administrator of a debtor, gave an undertaking to a creditor of the deceased, to furnish money to meet an acceptance, which the creditor had given in furtherance of an accommodation arrangement for delaying payment in hope that funds may be forthcoming; held, that he was liable, on such undertaking, though he had not received funds applicable to the discharge of the debt.<sup>c</sup>

It is not necessary that the forbearance should extend to an entire discharge of proceedings; nor is it material whether the proceedings to be forborne have been commenced or not, or are at law, or in equity.<sup>d</sup> Desisting from further complaint before a justice of the peace.<sup>e</sup> So forbearing to proceed on a *capias utlegatum*,<sup>f</sup> is a good consideration. Forbearance to sue for a little time,<sup>g</sup> or for some time,<sup>h</sup> is not sufficient; but forbearance for a limited period with power to continue it, if the debt be not then paid, is sufficient. Where the declaration stated the consideration to be an agreement for forbearance, (not showing for what time,) and there was an averment that the plaintiff forbore for a long time; held, on a motion in arrest of judgment to be sufficient, for it shall be intended that the plaintiff agreed to forbear for a convenient or reasonable time, and that is a sufficient consideration. (1) An agreement to give up and to forbear to sell the goods of a third person, against which the plaintiff held a bill of sale for a debt, is a sufficient consideration.<sup>i</sup>

For what time.

<sup>a</sup> Willatts v. Kennedy, 8 Bing. 5. (21 Eng. C. L. 200.)

<sup>b</sup> Smith v. Algar, 1 B. & Ad. 603. (20 Eng. C. L. 452.) See also Pullin v. Stokes, 2 H. Bl. 312.

<sup>c</sup> Mand v. Waterhouse, 2 C. & P. 579. (12 Eng. C. L. 273.)

<sup>d</sup> Scott v. Stephenson, 1 Lev. 71. Poolly v. Gilberd, 2 Bulstr. 41. Parker v. Leigh, 2 Stark. 229. (3 Eng. C. L. 327.) Ch. Con. 31.

<sup>e</sup> Rippon v. Norton, Cro. Eliz. 881.

<sup>f</sup> Jennings v. Harley, *id.* 909.

<sup>g</sup> 1 Roll. Ab. 23.

<sup>h</sup> *Id.* pl. 26.

<sup>i</sup> Mapes v. Sidney, Cro. Jac. 683. See Baker v. Jacob, 1 Bulst. 41.

<sup>j</sup> Barrell v. Trussell, 4 Taunt. 117.

(1) (Sidwell v. Evans, 1 Penna. 385. Lonsdale v. Brown, 4 Wash. C. C. 148. Downing v. Park, 5 Rawle, 69.)



Forbear-  
ance to  
sue on a  
cognovit.

\*33

If the declaration omit to state to whom forbearance was given, it will be bad or demurrer,<sup>a</sup> but the omission will be "cured by verdict;"<sup>b</sup> for it might be presumed that the plaintiff had proved at the trial, that there was somebody who could have been sued, in support of the averment, "that the plaintiff did forbear." Where the declaration stated that the plaintiff at the request of the defendant *would consent* to suspend proceedings against *A.*, on a cognovit, defendant promised to pay 30*l.* on account of the debt, (for which the cognovit was given) on the 1st of April then next. Averment that the plaintiff did suspend proceedings on the cognovit;—at the trial the plaintiff proved the following agreement in writing. "Mr. R.," (the plaintiff,) "having at my request consented to suspend proceeding against *A.*, I do hereby in consideration thereof, personally promise to pay 30*l.* on account of the debt, on the 1st day of April." Held, that as the request must have preceded the consent to suspend proceedings, the contract might be declared on as executory; and, consequently, that there was not any variance. Secondly; that, though forbearance to sue for any definite time was not alleged, the consideration for the promise was sufficient, because it must be taken as a consent to suspend proceedings, at least until the 1st of April. Thirdly, that after verdict the averment that, "plaintiff had suspended proceedings," was sufficient, without specifying for what period, because it must be taken after verdict, that he had suspended the proceedings, either for a time required by law, or for a definite or reasonable time.<sup>c</sup>

Where the  
party is  
not liable.

\*34

But forbearance of suit against a party who is not liable to the demand, either in law, or in equity, is not a sufficient consideration, as where an heir promised to pay a bond debt of his ancestor's in consideration of forbearance, the court held on a motion in arrest of judgment, that an action was not maintainable on the promise, as it did not appear that the ancestor had bound himself *and his heirs*, by the bond, and as the heir was not expressly named, he was not liable.<sup>d</sup> If *A.* be illegally arrested by *B.* for a debt, a promise by *C.* to pay the debt, in consideration of releasing *A.* out of custody, is void; but where the declaration against *C.* on such a promise stated that "*A.* was arrested, &c., by virtue of a writ duly issued, &c., the court said that they must intend after verdict, that the arrest was legal.<sup>e</sup> So where a married woman gave a promissory note as a *feme sole*, and after her husband's death in consideration of forbearance, promised to pay it; held not sufficient; for forbearance, where originally there was no cause of action is no consideration to raise assumpsit.<sup>f</sup>

<sup>a</sup> Jones v. Ashburnham, 4 East, 455.

<sup>b</sup> Marshall v. Birkenshaw, 1 N. R. 172.

<sup>c</sup> Payne v. Wilson, 7 B. & C. 423. (14 Eng. C. L. 69.)

<sup>d</sup> Barber v. Fox, 2 Saund. 135. Hunt v. Swain, 1 Lev. 165. Tooley v. Windham, Cro. Eliz. 206.

<sup>e</sup> Atkinson v. Settree, Willes, 482.

<sup>f</sup> Lloyd v. Lee, 1 Stra. 94. Fabian v. Plant, 1 Show. 183. S. N. P. 52. *post*, 36.

3.—*Moral obligation.*] When a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration which will support his promise. As if a man promises to pay a just debt, the recovery of which is barred by the statute of limitations;<sup>a</sup> or if a man after he comes of age promises to pay a meritorious debt contracted during his minority, but not for necessities;<sup>b</sup> or if a bankrupt in affluent circumstances after his certificate promises to pay the whole of his debts.<sup>c</sup>(1) In such and in many other instances, the promise gives a compulsory remedy.<sup>d</sup> Where a married woman having an estate settled to her separate use, gave a bond for repayment by her executors, of money advanced at *her request*, on security of that bond, to her son-in-law; after her husband's decease she gave a promise in writing that her executors should settle the bond; held, that there was a sufficient moral obligation to support the promise, and that her executors were liable thereon.<sup>e</sup>

Promise to pay a debt incurred by a married woman.  
\*35

But in a modern case where a butcher supplied a married woman with meat, for her own use, in the absence of her husband, and after the decease of the husband, she promised to pay for it, when of ability; the declaration alleged that the promise was in consideration of goods supplied to *her*, which in law imported that she was originally the debtor; whereas the husband was the party liable; the court held the variance to be fatal. Lord Tenterden observed, that this case was distinguishable from *Lee v. Muggeridge*, inasmuch as in the latter, all the circumstances which showed that the money was, in conscience, due from the defendant, were correctly set forth in

<sup>a</sup> But such promise must be in writing, 9 Geo. IV, c. 14. See *post*, *Limitation, Statutes of*.—It must also be unequivocal. *Brigstocke v. Smith*, 1 C. & M. 483. And if conditional it must be so declared on, and the plaintiff must show the condition performed. *Tanner v. Smart*, 6 B. & C. 603. (13 Eng. C. L. 273.) And it has been held, that the defendant cannot be arrested on such a promise. *Wilson v. Kemp*, 3 M. & S. 595.

<sup>b</sup> The general rule appears to be, that a contract made by an infant, for his benefit, (though not for necessities,) is voidable only, and not void; and if, after obtaining his majority, he ratifies such contract, or promises to perform it, it is binding on him. *Zouch v. Parsons*, 3 Burr. 1805. *Gibbs v. Merrill*, 3 Taunt. 313. *Southerton v. Whitlock*, 2 Stra. 690. Co. Litt. 3. a. But by 9 G. IV, c. 14, s. 5, such promise must be in writing and signed by the party. See *Infant*, in the index.

<sup>c</sup> *Freeman v. Fenton*, Cowp. 544. *Brix v. Braham*, 1 Bing. 281. (8 Eng. C. L. 324.) By 6 G. IV, c. 16, s. 131. Such promise to be binding must be in writing. But a person who has taken the benefit of the insolvent debtors' act, is not liable on a promise to pay a debt previously incurred. See *Evans v. Williams*, 1 C. & M. 38.

<sup>d</sup> Per lord Mansfield, C. J. in *Hawkes v. Saunders*, Cowp. 290. 1 C. & M. 38.

<sup>e</sup> *Lee v. Muggeridge*, 5 Taunt. 36. (1 Eng. C. L. 10.) A party to a bill of exchange who is discharged for want of due notice of its dishonor, is liable on a subsequent promise of payment. *Rogers v. Stephens*, 2 T. R. 713. *Lundie v. Robertson*, 7 East, 231. *Gibbon v. Coggon*, 2 Campb. 168.

(1) (A moral obligation is available as a consideration for an express promise in those cases only where a prior legal obligation has existed, which, by reason of some statute or stubborn rule of law, cannot now be enforced. *Cook v. Bradley*, 7 Conn. 57.)

the declaration. "I must also observe," said his lordship, "that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise, is one which should be received with some limitation."<sup>a</sup>

Usury.

Where usurious securities for a loan were destroyed by mutual consent, a subsequent promise to pay the principal and legal interest was held to be binding.<sup>b</sup> After *A.* had paid the whole of a demand made by *B.*, part of which was due to *C.*, *B.* engaged to indemnify *A.* against any claims by *C.*; held a

Past cohabitation.

sufficient consideration.<sup>c</sup> Past cohabitation is a sufficient consideration for a promise to pay a female money for her support, if the promisor had been her seducer, he being under a moral obligation to repair the injury which he has inflicted.<sup>d</sup> A bill drawn in favor of an alien enemy, is a sufficient consideration for a promise made in time of peace, to pay principal and interest.<sup>e</sup>

\*36

\*If *A.* be under a moral obligation to do a thing, and *B.* does it without his request, and *A.* afterwards promises to pay, that is good; therefore, where a pauper was suddenly taken ill, and an apothecary attended her without the previous request of the overseers, and afterwards the overseers promised to pay, it was held binding, for they were under a moral obligation to provide for the poor.<sup>f</sup>

Liability of overseers.

Lost note.

If a party to a bill or note be not liable thereon to a creditor, in consequence of such creditor to whom he indorsed it for a debt having lost the instrument, a promise by the former to pay it, is not founded on a sufficient moral obligation to render him liable on such promise.<sup>g</sup> So where a married woman carrying on business as a *feme sole*, trader in the city of London, purchased of the plaintiff articles in the way of her trade, and after her death her husband promised to pay for them, held, that the promise was not binding, for there was no consideration as the husband was not liable for such articles.<sup>h</sup>

<sup>a</sup> Littlefield v. Shee, 2 B. & Ad. 811. (22 Eng. C. L. 187.)

<sup>b</sup> Barnes v. Hedley, 2 Taunt. 184.

<sup>c</sup> Lord Suffield v. Bruce, 2 Stark. 175. (3 Eng. C. L. 301.)

<sup>d</sup> Gibson v. Dickie, 3 M. & Sel. 463. But if he be not the seducer it is otherwise.

<sup>e</sup> Binnington v. Wallis, 4 B. & A. 650. (6 Eng. C. L. 554.)

<sup>f</sup> Duhamel v. Pickering, 2 Stark. 90. (3 Eng. C. L. 260.)

<sup>g</sup> Watson v. Turner, B. N. P. 129. This case may be supported on strict legal principles without resorting to the doctrine of moral obligations. Sel. N. P. 57. n.; and so may Lamb v. Bounce, 4 M. & S. 275; and Wing v. Mill, B. & A. 104, which are classed under this head. *Id.* See these cases, and the doctrine of moral obligation ably discussed in a note to Wennall v. Abney, 3 Bos. & Pul. 247; where the author, after adverting to all the authorities, comes to the conclusion, "that an express promise can only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action if the obligation on which it is founded, never could have been enforced at law, though not barred by any legal maxim or statutory provision."

<sup>h</sup> Davis v. Dodd, 4 Taunt. 602. Per Park, J., Champion v. Terry, 7 Moor, 136. (6 Eng. C. L. 443.) Hansard v. Robinson, 7 B. & C. 90. (14 Eng. C. L. 20.)

<sup>i</sup> Fabian v. Plant, 1 Show. 183.

4—*A passed consideration.*] Where a consideration is When the past or executed, it is not sufficient to support a subsequent pro- considera- mise, unless there was a *request* of the party expressed or tion is implied at the time of performing the consideration; for it is passed there must not reasonable that one man should do another a kindness and be a prior then charge him with a recompense.<sup>(1)</sup> This would be oblig- request. ing him whether he would or not. Therefore, where *A*'s ser- \*37 vant *\*was* arrested in London for a trespass, and *J. S.*, who knew *A.*, bailed him, and afterwards *A.* for his friendship promised to save him harmless, and *J. S.* comes to be charged; held, that this is no consideration to ground *assumpsit*, because the bailing, which was the consideration, was past and executed before. But it had been otherwise if the master had previously requested him to become bail for his servant.<sup>a</sup> But where a party derives a benefit from the consideration it is sufficient, because equivalent to a previous assent; as where a man pays a sum of money, or buys some goods for me without my knowledge or request, and afterwards I agree to the payment, or receive the goods, this is equivalent to a previous request to do so.<sup>b</sup>(2) On the same principle, a promise, even in writing, to pay a debt actually incurred by a third person is not available, if there be no new consideration, as forbearance to sue, &c.<sup>c</sup> In general, when the defendant has derived no benefit from the plaintiff's acts, the prior request must be expressly proved.<sup>d</sup> Unless a benefit is derived from it.

On the same principle, it has been held, that the husband is Liability of a husband. not liable to be sued alone for the use and occupation of his wife, *dum sola*, as it cannot be said that she occupied at his request,<sup>e</sup> and even a promise by the husband to pay the debt of his wife, contracted before marriage, without showing any new consideration, has been held not binding.<sup>f</sup>(3) So where a person pays money to another on my account, without my request, *assumpsit* will not lie without an express promise to repay it; for I may have a good reason to resist the payment of the money, and another person shall not pay it for me, whether I will or not.<sup>g</sup>(4) But if the payment made by the plaintiff be compulsory, the law raises an implied promise on the Payment by compulsion.

<sup>a</sup> 1 Saund. 264; Hunt v. Bate, Dy. 272. a. But if it had been laid to have been done at the defendant's request, it should seem that the defendant's receiving the servant again, and taking the benefit of his service, would have been sufficient evidence of such request, n, b. *ib.* 5th. Ed.

<sup>b</sup> *Id.* <sup>c</sup> 1 Rol. Ab. 27. <sup>d</sup> Naish v. Tatlock, 2 H. Bl. 319.

<sup>e</sup> Richardson v. Hall, 1 Brod. & Bing. 50. (5 Eng. C. L. 14.)

<sup>f</sup> Mitchinson v. Hewson, 7 T. R. 848.

<sup>g</sup> Stokes v. Lewis, 1 T. R. 20. 1 Saund. 264. n.

(1) (*Parker v. Crane*, 6 Weind. 647.)

(2) (If one accepts or knowingly avails himself of the benefit of services done for him without his authority or request, he shall be held to pay a reasonable compensation for them. *Abbot v. Herman*, 7 Greenleaf, 118. See *Welsh v. Welsh*, 5 Ohio, 427.)

(3) (*Carl v. Wonder*, 5 Watts, 97.)

(4) (*Turner v. Egerton*, 1 Gill & Johns. 430. *Baltimore v. Hughes*, *ibid.* 480.)

- \*38 part of the defendant to repay him, and the compulsion is evidence of the request, as \*when a surety is compelled to pay the whole debt, he may recover it from the principal in an action of assumpsit, without any actual request or promise on the part of the plaintiff.<sup>a</sup>

5.—*A promise without a reward when sufficient.*] Though in general no action will lie on a promise to do a thing without recompense, yet where there is a delivery of money or chattels to a person who undertakes to do something respecting them without any remuneration, an action will lie on his bailment; as where the declaration stated that the plaintiff being indebted to *J. S.*, delivered to the defendant a sum of money to the intent that he should pay it to *J. S.* in part payment, without delay, in consideration whereof the defendant promised so to pay it; breach that the defendant had not paid the money; whereupon *J. S.* had sued the plaintiff for the debt. On a motion in arrest of judgment, after verdict for the plaintiff, it was objected, that there was not any consideration, as there was no allegation that the plaintiff so delivered the money to the defendant at his request; but the court held, that as the defendant *accepted* the money to deliver it, it was a good consideration to charge him.<sup>b</sup> So where the plaintiff delivered to the defendant, a coffee-house keeper, a sum of money in order to take up a bill of exchange with it, and the defendant put it in his cash-box in the tap-room, from which it was stolen, it was held, that though the defendant was not to receive any reward, he was liable in assumpsit for the money; the jury having found that he was guilty of *gross negligence*.<sup>c</sup> So where the declaration stated that the plaintiff had retained the defendant at his request to lay out 900*l.* on the purchase of an annuity; that the defendant promised to use due care to lay out the money securely, that the plaintiff \*confiding, &c., delivered the money to the defendant for that purpose; on error after verdict for the plaintiff, the court held that the *mere delivery of the money*, was a sufficient consideration for the promise.<sup>d</sup>

\*39

Where the declaration alleged that the plaintiff paid into the banking house of the defendants, in London, a sum of money in order that the defendant might cause the same to be paid

<sup>a</sup> *Toussaint v. Martinnant*, 2 T. R. 100. 1 Saund. 264. n. 5th Ed. A previous request is necessary only in cases of consideration executed and passed. Per Parke, B., in *King v. Sears*. 2 C. M. & R. 48. 1 Gale, 243.

<sup>b</sup> *Wheatley v. Low*, Cro. Jac. 667, recognised and acted upon by Lord Raymond, in *Coggs v. Barnard*, 2 Ld. Raym. 909.

<sup>c</sup> *Doorman v. Jenkins*, 2 Ad. & Ell. 256. (29 Eng. C. L. 80.) 4 N. & M. 170. A bailee without reward is not liable, unless he be guilty of *gross negligence*, which the court considered in *this case*, to be a question of fact for the jury.

<sup>d</sup> *Whitehead v. Gretham*, 2 Bing. 464. (9 Eng. C. L. 483.) 10 Moore, 183. M'Clell. & Y. 205. The defendant, however, in such a case is not liable if he act honestly and be not guilty of gross and culpable negligence. *Dartnall v. Howard*, 4 B. & C. 345, (10 Eng. C. L. 351,) *post*. *Elsee v. Gatward*, 5 T. R. 143.



at a certain time then agreed upon, to the order of the plaintiff, at *N.*, and in *consideration of the premises*, the defendants *promised* that they would cause the same to be paid, &c.; held, that the consideration was sufficient to support the promises; for placing the money in the hands of the defendants, was a detriment to the plaintiff. It was an absolute undertaking on behalf of the defendants to pay the money at *N.*, the declaration, therefore, was sufficient without alleging that the money was left with the defendants at their *request*.<sup>a</sup>

6.—*Performance of a duty.*] The performance of a duty is not a sufficient consideration for a promise; as where a bailiff declared that having arrested one *S.*, and in consideration that he would take the defendant and another as bail for *S.*, the defendant promised to pay him six guineas, for which this action was brought; held not maintainable, it being a bailiff's duty to take proper bail without any recompense or reward whatever.<sup>b</sup>(1) So an action will not lie upon an express promise to pay a seaman extra wages, in consideration that he will exert himself in an extraordinary manner for the preservation of the ship, for it is his duty to exert himself to the utmost in the service of the ship.<sup>c</sup> So where, in the course of the voyage, some of the crew deserted, and the captain promised to divide the wages that would become due to them, among the remainder; held, that it<sup>\*</sup> was a promise without a consideration, for in such an emergency it was the duty of the remainder, by the terms of the original contract, to exert themselves for the preservation of the ship.<sup>d</sup> So where an attorney attended pursuant to a subpoena, to give evidence at a trial, and brought an action for remuneration, Lord Tenterden said, "If it be a duty imposed by law upon a party regularly subpoenaed, to attend from time to time to give his evidence, then a promise to give him remuneration for loss of time incurred in such attendance, is a promise without consideration. We think that such a duty is imposed by law, and we are all of opinion that a party cannot maintain an action for compensation for loss of time in attending a trial as a witness."<sup>e</sup>

Seamen are not entitled to extra wages for extraordinary exertions.

\*40

A witness is not entitled to compensation for loss of time.

<sup>a</sup> *Shillibeer v. Glyn*, 2 M. & W. 143.

<sup>b</sup> *Stotesbury v. Smith*, 2 Burr. 924. See also *Bridge v. Cage*, Cro. Jac. 103. *Morris v. Burdett*, 1 Campb. 218.

<sup>c</sup> *Harris v. Watson*, Peake, 72.

<sup>d</sup> *Stilk v. Myrick*, 2 Campb. 317. But if a passenger lends assistance under such circumstances, a subsequent promise by the captain to remunerate him, is a good consideration. *Newman v. Walters*, 3 Bos. & P. 612.

<sup>e</sup> *Collins v. Godefroy*, 1 B. & Ad. 950. (20 Eng. C. L. 514.) *Willis v. Peckham*, 1 B. & B. 515. (5 Eng. C. L. 171.) S. P. But allowance may be made in costs for loss of time to a foreign witness, who is not accessible by subpoena, and refuses to

(1) (But where the officer on the promise of an extra reward uses extraordinary efforts, held maintainable, *Hatch v. Mann*, 9 Wend. 202.)

7.—*Impossible consideration.*] A consideration is insufficient if the party from whom it moved, has it not in his power in fact, or in law, to carry it into effect;<sup>a</sup> as where the plaintiff declared, that being bailiff to *J. S.*, the defendant in consideration *that he would discharge him of 20*l.* due to J. S.* promised, &c.; held insufficient, for the plaintiff could not discharge a debt due to his master.<sup>b</sup> Where the declaration stated that by agreement between the plaintiff and *G.*, the plaintiff agreed to sell and deliver to *G.* a lace machine for 220*l.*, to be paid by weekly instalments, which were to be paid to the defendant, as trustee for the plaintiff; and in case of any default the plaintiff was to have back the machine, and in consideration of the premises, the defendant promised to take the machine and pay the balance, should there be any default by *G.*; held, that the promise was *nudum pactum*, and therefore void —the declaration did not show that it was \*in the plaintiff's power to deliver the machine, or that he had ever got it back from the vendor.<sup>c</sup>

\*41

8.—*Consideration bad in part.*] A consideration may be bad in part and good for the remainder; but if any part of the consideration be *illegal*, it taints the whole transaction, and there is no distinction between considerations void by statute, and such as are void at common law.<sup>d</sup>

Several  
considera-  
tions.

Where two considerations are alleged, the one good and sufficient, the other idle and vain; if that which is good be proved, it sufficeth; and though he fail in the proof of the other, it is not material, because it was in vain to allege it; but if both be good, both must be proved.<sup>e</sup>(1) Though three considerations may be stated for a promise, and one of them is, in fact nothing, if the others are a good consideration the promise is binding.<sup>f</sup> Where a promise rests on two considerations, one of which is impossible or unintelligible, you may reject the impossible or unintelligible, and resort to that which is possible and plain; but if part of the consideration is *illegal* the contract is void.<sup>g</sup> If an agreement be in the

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attend without compensation. *Lonergan v. Royal Exchange Assurance Co.*, 7 Bing. 729. (20 Eng. C. L. 308.)

<sup>a</sup> *Per Curiam*, in *Nerot v. Wallace*, 3 T. R. 22.

<sup>b</sup> *Harvey v. Gibbons*, 2 Lev. 161.

<sup>c</sup> *Bates v. Cort*, 2 B. & C. 474. (9 Eng. C. L. 150.) 3 D. & R. 676.

<sup>d</sup> *Per Tyndal, C. J.*, in *Shackell v. Rosier*, 2 Bing. N. C. 646, (29 Eng. C. L. 443,) *ante*, 23.

<sup>e</sup> Bull. N. S. 147. *Crisp v. Gamel*, Cro. Jac. 128.

<sup>f</sup> *Per Lord Abinger, and Parke, B.*, in *King v. Sears*, 1 Gale, 243. 2 C. M. & R. 48.

<sup>g</sup> *Per Tyndal, C. J.*, in *Shackell v. Rosier*, 2 Bing. N. C. 646. *Waite v. Jones*, 1 Hodg. 166. *Featherstone v. Hutchinson*, Cro. Eliz. 199. *Scott v. Gillmore*, 3 Taunt. 226, *ante*, 10. *Bridge v. Cage*, Cro. Jac. 103. *Morris v. Chapman*, Sir T. Jones, 24.

(1) (See *Parish v. Stone*, 14 Pick. 198. *Loomis v. Newhall*, 15 Pick. 159. *Sylvester v. Girard*, 4 Rawle, 185.)



alternative, and one branch of the alternative cannot by law be performed, the party is bound to perform the other.<sup>a</sup>

But if promises be entire, and part be void for want of writing, pursuant to the statute of frauds, they are void altogether; as where *A.* being indebted to the plaintiff for half-a year's rent of a farm, due on the 25th of March, the defendant, an auctioneer, being about to sell *A.*'s goods in August, the plaintiff came to distrain for his rent, when the defendant in consideration that he would not distrain, *verbally* promised to pay him not only the rent then due, but the rent that would become due at the Michaelmas following; held, that the promise to pay the accruing rent, was within the statute of fraud, and therefore void, and that the promise being entire, and in the commencement void in part, was void altogether, and that the plaintiff could not recover from the defendant the rent due on the 25th of March.<sup>b</sup>

When the promise is entire.

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9.—*The consideration must move from the plaintiff.*] As where *A.*, being severally indebted to *B.* and *C.*, and having a debt due to him from *D.*, *C.*, in consideration that *A.* would permit him to sue *D.* in his name, promised to pay *B.* the debt which *A.* owed to him, held, that though *C.* recovered the debt from *D.*, *B.* could not maintain an action against *C.* on the promise, for he was a stranger to the consideration, and did nothing of trouble to himself or of benefit to *C.*<sup>c</sup> So where the declaration alleged that '*A.* was indebted to *B.*, the plaintiff, and that it was agreed between *A.* and *C.* that *C.* should pay that debt, and that *A.* should make to him a title to a house; averment, that *A.* was always ready to perform his part of the agreement, and that *C.* in consideration thereof, promised to pay the plaintiff; held, that *B.* could not maintain an action against *C.*, because he was a stranger to the contract.<sup>d</sup>(1) So where the declaration stated that *W.* owed the plaintiff 13*l.*, and that, in consideration thereof, and that *W.* had promised the defendant to work for him at certain wages and leave the amount of his earnings in his hands, the defendant undertook to pay the plaintiff the said sum of 13*l.*, averment, that *W.* performed his part of the agreement. After verdict for the plaintiff, the court held, on a motion in arrest of judgment, that the declaration could not be supported, as it did not show any privity between the plaintiff and defendant; there was no consideration for the promise moving from the former to the latter; the case was precisely like *Crow v. Rogers*.<sup>e</sup>

A stranger to the consideration cannot recover.

<sup>a</sup> *Stevens v. Webb*, 7 C. & P. 60.

<sup>b</sup> *Thomas v. Williams*, 10 B. & C. 664. (21 Eng. C. L. 143.) *Chater v. Becket*, 7 T. R. 201. S. P. *Levington v. Clarke*, 2 Vent. 223.

<sup>c</sup> *Bourne v. Mason*, 1 Vent. 6. B. N. P. 134.

<sup>d</sup> *Crow v. Rogers*, 1 Str. 592.

<sup>e</sup> *Price v. Easton*, 4 B. & Ad. 433. (24 Eng. C. L. 96.) 1 Nev. & M. 303.

(1) (*Morris v. Beakey*, 6 Watts, 349.)

A promise to the father to pay the daughter, when good.

When not.

Consideration moving from an agent.

\*But where a tenant in fee simple being about to cut down timber for his daughter's portion, the defendant, his heir at law, in consideration of his forbearing so to do, promised the father to pay a sum of money to the daughter; in an action by the daughter's husband for the sum which the defendant so promised, it was objected that the daughter was not privy to the contract, the promise was made to the father; but the court held that there was a privity in blood, that the consideration and promise to the father might well extend to the children. The defendant derived a benefit from the contract, and the daughter lost her portion by that means.<sup>a</sup> Yet, where the son promised the father that, in consideration that he would surrender a copyhold to him he would pay a certain sum to his sister, for which she brought an action; held, that it would lie for none but the father; for where the party to whom the promise is to be performed is not concerned in the meritorious cause of it he cannot bring the action.<sup>b</sup> Where money was paid to the defendant by a third party for the use of the plaintiff, and the defendant admitted that he had received it for the use of the plaintiff, it was held, that the party paying the money might be considered as the agent of the plaintiff, so that the consideration would move indirectly from the plaintiff, and support an action for money had and received.<sup>c</sup>

## SECTION VII.

### ASSUMPSIT IS EITHER SPECIAL OR GENERAL.

\*44  
Special  
assumpsit

WHERE the contract is founded on an executory consideration, or on a consideration of forbearance, or of mutual promises, or on a legal liability without an express promise, the plaintiff \*should declare *specially*. But where the consideration is executed and the contract is for the payment of money, the general form of *indebitatus assumpsit* will lie. "I have always understood," said Tyndal, C. J., "the distinction as to the obligation to sue on the special contract rather than on the general count to be, that where at the time of the payment, any thing remains to be done under the contract, of which the plaintiff must show performance, the action should be on the special contract; but where all has been done, and the plaintiff has

<sup>a</sup> Dutton & Ux. v. Poole, 2 Lev. 210. Affirmed in error in the Exchequer chamber. Sir T. Ray, 302.

<sup>b</sup> Pine v. Morris, B. N. P. 134.

<sup>c</sup> Lilley v. Hays, 1 N. & Perry, 26. See Williams v. Everett, 14 East, 582, *post*. Wedlake v. Hurley, 1 C. & J. 83, *post*. In these cases, however, the defendants *did not consent* to hold the money for the use of the plaintiffs.

only to prove the payment of the money, then he may sue on the general count.”<sup>a</sup>(1)

Upon all contracts for work to be done in a particular way, or at particular times, or for goods sold, to be paid for or delivered at particular times, after the work has been done, and the goods delivered, the plaintiff may resort to the general count for work and labor, or for goods sold and delivered.<sup>b</sup>

It may be laid down as a general rule, that an *indebitatus assumpsit* will not lie in any case but where debt will lie.<sup>c</sup>

The common counts of the most extensive application and of the most frequent occurrence being “money had and received,” “money paid,” “goods sold and delivered,” “work and labor,” and “account stated,” we shall proceed to inquire in what cases they are sustainable. The common counts.

\*SECTION VIII.

\*45

MONEY HAD AND RECEIVED.

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1.—*When it will lie in general.*] In general, whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund, it may be recovered from him in an action for money had and received to the plaintiff’s use.<sup>d</sup> This form of action has been of late years extended on the principle of its being considered like a bill in equity. And therefore, in order to recover on a count for money had and received, the plaintiff must show that he has equity and con-

<sup>a</sup> Per Tyndal, C. J., in *Grissell v. Robinson*, 3 Bing. N. C. 15.  
<sup>b</sup> Per Gaselee, J., *id.* 17.  
<sup>c</sup> Hard’s case, Salk. 23. As an exception to this rule, the common count will lie, and *debt* will not, for the recovery of part of a debt payable by instalments before the whole is due, *ante*, 5.  
<sup>d</sup> Per Lord Mansfield, C. J., in *Moses v. Macfarlen*, 2 Burr. 1012.

(1) (*Chesapeake and Ohio Canal Company v. Knapp*, 9 Peters, 541. *Russell v. South Britain Society*, 9 Conn. 508. *Feeter v. Heath*, 11 Wend. 477.)

science on his side, and that he could recover it in a court of equity.<sup>a</sup>

The plaintiff may waive a tort.

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In many cases where the defendant has received money which belonged to the plaintiff, under circumstances which would render him liable in an action *ex delicto*, the plaintiff may waive the *tort*, and sue in an action for money had and received.<sup>b</sup> Where the plaintiff and defendant both claiming to act as clerks to the justices of the division, agreed to refer the dispute to third parties, who decided that the defendant should do the duties of the office and divide the fees with the plaintiff: held that an action for money had would lie to recover the moiety of the \*fees received.<sup>c</sup> Where a person has usurped an office belonging to another, and taken the known and accustomed fees, the party entitled to the office may sue the intruder, in this form of action, to recover such fees, and thereby try the right to the office.<sup>d</sup> Where the plaintiff delivered a sum of money to the defendant to be paid to a third party and lost it, it was held, that an action for money had and received would lie against him. Though he was also liable in case for negligence.<sup>e</sup>

Receipt of rents.

The courts will not allow a title to land to be tried in an action for money had and received. Therefore rents received under an adverse holding or possession, are not recoverable by the rightful owner in this form of action.<sup>f</sup> But bygone rents of a life estate may be recovered in this form of action, after the death of the tenant for life from a person who had received them under color of a fraudulent assignment.<sup>g</sup>

2.—*Money must have been received.*] It must appear that the defendant received *money* for the use of the plaintiff; any other consideration will not be sufficient to sustain this action.<sup>h</sup>

Stock.

Therefore this action will not lie for stock, it being a new species of property and not money;<sup>i</sup> or for foreign securities, or paper-money, unless the defendant has had an opportunity of converting the latter into British money.<sup>j</sup>

Provincial notes.

Provincial notes are not money, yet if the party receive them as money, and all parties agreed to treat them as such, the defendant should not be permitted to say that they were only paper and not money:

<sup>a</sup> Per Buller, J., in *Straton v. Rastall*, 2 T. R. 370.

<sup>b</sup> See *ante*, 4.

<sup>c</sup> *Roland v. Hall*, 1 Hodges, 111. 1 Scott, 539.

<sup>d</sup> *Boyter v. Dodsworth*, 6 T. R. 681. *Powell v. Milbank*, 1 T. R. 399, n. *Green v. Hewitt*, Peake, 182.

<sup>e</sup> *Barry v. Roberts*, 1 Har. & W. 242. 3 Ad. & Ell. 118. 5 N. & M. 669.

<sup>f</sup> *Pearce v. Day*, before Lord Tenterden, sittings H. T. 1826, cited in 2 Russ. & M. 124. *Moneypenny v. Bristow*, *id.* 117.

<sup>g</sup> *Id.*

<sup>h</sup> *Wharton v. Walker*, 4 B. & C. 163. (10 Eng. C. L. 302.) See *Moore v. Pyrke*, 11 East, 52. *Maxwell v. Jameson*, 2 B. & A. 51. *Davies v. Watson*, 2 N. & M. 709, (28 Eng. C. L. 377,) *post.* *Green v. Rowan*, 7 C. & P. 119.

<sup>i</sup> *Nitingale v. Devisme*, 5 Burr. 2589. See *Jones v. Brinly*, 1 East, 1.

<sup>j</sup> *M'Lachlan v. Evans*, 1 Y. & J. 380.

as against him it was so much money received by him.<sup>a</sup> The principle of all the cases is, that if a thing be received as \*money, it may be treated and recovered as such.<sup>b</sup> (1) Where the property received by the defendant is readily converted into money, and his conduct affords a presumption that he has so converted it, it may be recovered in this form of action.<sup>c</sup> Where an agent employed to receive money, and bound by his duty to his principal to communicate from time to time whether the money is received or not, renders an account which contains a statement that the money is received, he is bound by that account, unless he can show that that statement was made unintentionally and by mistake. If he cannot show that, he will not be at liberty afterwards to say that the money had not been received.<sup>d</sup>

Account-  
ing by an  
agent.

Where an insurance broker having received credit in account with an underwriter for a loss upon a policy, whereupon the name of the underwriter was erased from the policy; held, that the principal might maintain an action for money had and received against the broker, though he had not actually received any money from the underwriter: for as he had deprived the plaintiff of all remedy against the underwriter, and having received credit in account for the money, he was estopped from saying that he had not this sum in his hands for the plaintiff's use.

By an in-  
surance  
broker.

Where the parties of a bill of exchange wrongfully deposited it with the bankers and obtained money on the credit of it, it was held that the amount could not be recovered from him, in an action for money had and received; as the bill was *not due* before the action was brought, for it could not be considered as money received for the use of the plaintiff, unless the bill was honored; and if the bill should be dishonored the defendant would be liable to the bankers.<sup>e</sup>

Money re-  
ceived on  
a bill not  
due.

\*3.—*When it will lie against a stakeholder.*] If a deposit be made with a stakeholder subject to the event of a *legal wager*, and after the wager is determined he pays it over to the winner, the loser cannot maintain an action for money had, &c. against the stakeholder;<sup>f</sup> but if he wrongfully pays it over to the loser, the winner may recover it from him, the stakeholder, in an action for money had and received.<sup>g</sup> But if the

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<sup>a</sup> Per Lord Ellenborough, C. J., in *Pickard v. Banks*, 13 East, 21.

<sup>b</sup> Per Best, C. J., *Spratt v. Hobhouse*, 4 Bing. 179. (13 Eng. C. L. 395.) In this case a check was held to be money, it being treated as such.

<sup>c</sup> *Longchamp v. Kenny*, Doug. 137. See *Leerey v. Goodson*, 4 T. R. 687. *Whitwell v. Bennett*, 3 B. & P. 559. *Hunter v. Welch*, 1 Stark. 224. (2 Eng. C. L. 365.)

<sup>d</sup> *Shaw v. Picton*, 4 B. & C. 729. (10 Eng. C. L. 449.) *Shaw v. Dartnall*, 6 B. & C. 56. (13 Eng. C. L. 106.) *Andrew v. Robinson*, 3 Campb. 199.

<sup>e</sup> *Atkins v. Owen*, 6 N. & M. 309. The court said that trover was the proper remedy in this case.

<sup>f</sup> *Brandon v. Hibbert*, 4 Camp. 37.

<sup>g</sup> *Pickard v. Banks*, 13 East, 20.

(1) (*Fairbanks v. Blackington*, 9 Pick. 93. *Tinslar v. May*, 8 Wend. 561.)

Illegal  
wager.

wager be *illegal*, either party may recover his share of the deposit from the stakeholder so long as it remains in his hands;<sup>a</sup> unless he has paid it over to the winner with the approbation of the loser;<sup>b</sup> and if he has so paid it over, after the loser has demanded it from him, or signified his dissent,<sup>c</sup> the loser may recover it from him in an action for money had and received.

But if *A.* receives money from *B.* for the use of *C.* on an illegal contract between *B.* and *C.*, *A.* shall not be allowed to set up the illegality of the contract, as a defence in an action by *C.* to recover it, not even if he retains it at the desire of *B.*, because the action is not founded on the illegal contract.<sup>d</sup>

4.—*When against an agent.*] This action should in general be brought against the principal, and not against the agent or other party who has paid it over to the principal, or according to the directions of the party who deposited it with him.

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Money  
paid over,  
cannot be  
recovered  
from an  
agent.

Where an arbitrator received money in dispute as a deposit until the question should be decided, and paid it over according to his award to the person whom he considered entitled to it; held, that though the person who deposited the money had previously committed an act of bankruptcy, the assignees could not \*sue the arbitrator for money had and received, for he paid the money over *bond fide* in ignorance of the bankruptcy; and as he was employed but as a mere gratuitous carrier, or a channel of delivery, it would be a great hardship and an obstruction to business, to make him liable for money passing through his hands under such circumstances.<sup>e</sup> So this action cannot be maintained against a collector of rents who paid the moneys so received over to the landlord;<sup>f</sup> nor against a churchwarden to recover back dues which, previous to the commencement of the action, had been paid over by him to the trustees of a chapel for whom they had been received;<sup>g</sup> nor against an excise officer to recover duties imposed by him after the act imposing them was repealed, if he has paid them over to his superior.<sup>h</sup>(1)

<sup>a</sup> *Cotton v. Thurland*, 5 T. R. 405. *Bate v. Cartwright*, 7 Price, 540.

<sup>b</sup> Per Littledale, J., *Hastelow v. Jackson*, 8 B. & C. 227. (15 Eng. C. L. 206.)

<sup>c</sup> *Robinson v. Mears*, 6 D. & R. 26. (16 Eng. C. L. 253.) *Smith v. Bickmore*, 4 Taunt. 474. *Hastelow v. Jackson*, 8 B. & C. 221. (15 Eng. C. L. 204.) *Hodson v. Terrill*, 1 C. & M. 797. See further, under the head *Gaming*.

<sup>d</sup> *Tenant v. Elliot*, 1 B. & P. 3. *Farmer v. Russell*, *id.* 296. This appears to be at variance with *Sullivan v. Greaves*, Park on *Insurance*, 8; but there the plaintiff could not show his title without showing the illegal contract.

<sup>e</sup> *Tope v. Hockin*, 7 B. & C. 101. (14 Eng. C. L. 22.) See also *Coles v. Robins*, 3 Campb. 183. *Coles v. Wright*, 4 Taunt. 198.

<sup>f</sup> *Sadler v. Evans*, 4 Burr. 1985.

<sup>g</sup> *Horsfall v. Handley*, 8 Taunt. 136. (4 Eng. C. L. 46.)

<sup>h</sup> *Greenaway v. Hind*, 4 T. R. 553.

(1) (A collector of the revenue is not personally liable in an action to recover back an excess of duties paid as collector and by him in the regular or ordinary course of his duty paid into the treasury of the United States, he the collector acting in good faith and under instructions from the treasury department, and no protest being made at the time of payment,



But to exempt an agent from liability the money *must be paid over* by him *bonâ fide* without notice of the plaintiff's claim; as where money was paid to an agent by mistake, who passed it in his account with the principal and gave him credit for it, against a sum in which the principal stood indebted to him; held, that this was not equivalent to the payment of the money over, and that an action for money had and received could be maintained by the person paying the money against the agent.<sup>a</sup> So, where an auctioneer, who was an attorney, had received money as a deposit on property which he had sold by auction, and after queries raised respecting the title, and before they were cleared, paid over the money to his principal—on demand of the deposit by the buyer, he answered, that his principal would not consent to return it, and would enforce the contract; held, that the buyer might maintain an action for money had and received against the auctioneer; 1st, because the defendant, as attorney, had notice that the title was not completed before he *\*paid over the money*: 2dly, because he misled the plaintiff to sue himself, by not saying he had paid over.<sup>b</sup> So, where the agent kept the money in his hands with the consent of the principal, for the express purpose of trying the validity of the claim of the principal, the agent was held liable.<sup>c</sup>

If it has been paid *bonâ fide* and without notice.

\*50

5.—*There must be a privity of contract between the plaintiff and the defendant.*] Where bankers received bills from their foreign correspondents with directions to pay the amount to the plaintiff, but on being applied to by him, refused to do so, although they afterwards received the amount of the bills; it was held, that an action for money had and received would not lie to recover it from them, there being no *privity* between them and the plaintiff. Lord Ellenborough observed, that it was competent to the person who remitted the bills to countermand his directions respecting them, and the defendants might hold the bills for the use of the remitter, until by some engagement entered into by themselves with the person who was the object of the remittance, they had precluded themselves from so doing, and had appropriated the remittance to the use of such person; but here, so far from there being such an engagement or appropriation, they repudiated it altogether.<sup>d</sup>(1) So,

If *A.* receives money to pay it to *B.*, *B.* cannot recover it from *A.* unless *A.* has engaged to pay it, or assented to hold it for *B.*

<sup>a</sup> Buller v. Harrison, Cowp. 565. "I take it to be clear that an agent who receives money for his principal is liable as a principal, so long as he stands in his original situation, and until there has been a change of circumstances, by his having paid over the money to his principal, or done something equivalent to it."—Per Lord Ellenborough, in Cox v. Prentice, 3 M. & S. 348.

<sup>b</sup> Edwards v. Hodding, 5 Taunt. 815. (1 Eng. C. L. 277.)

<sup>c</sup> Campbell v. Hall, Cowp. 204.

<sup>d</sup> Williams v. Everett, 14 East, 582. See Gibson v. Minet, 2 Bing. 7; (9 Eng. C.

or notice not to pay the money over, or intention to sue to recover back the amount given him. Elliott v. Shartwout, 10 Peters, 137.)

(1) (The question is the right. There is always a supposed privity of contract between



\*51

where *A.* remitted to *B.* a bank bill, indorsed, "pay to the order of *B.* under provision for my note in favor of *C.*; payable at the house of *B.* on the 1st of January, 1830;" *B.* received the proceeds of the bill and refused to pay them over to *C.*; held, that the latter could not maintain an action for money had and received against *B.*, because he had never assented to hold the money to the use of *C.*<sup>a</sup> But where money was paid into a banking house for the purpose of taking up a bill then lying there for \*payment; although the banker's clerk said at the time that he could not give up the bill, but took the money; it was held, that the owner of the bill might maintain an action for money had and received for it, and that it was not competent to the bankers to apply it to the general account of the acceptor who has paid the money.<sup>b</sup>

An agent receiving money on account of his principal is not liable to the party for whose use it was received.

Where *J.*, an attorney, who was accustomed to receive dues from the plaintiff, went from home, leaving *B.* his clerk at the office. *B.* in the absence of his master received money on account of the above dues, (which he was authorised to do,) and gave a receipt signed "*B.* for Mr. *J.*"—*J.* was in bad circumstances when he left home, and never returned; held, that an action for money had would not lie against *B.* for the money so received by him, for he received it as the agent of *J.* to whom he was accountable for it, and to whom he must have paid it over had he returned. There was no *privity* of contract between *B.* and the plaintiff; the privity being between the defendant and *J.*, and between *J.* and the plaintiff.<sup>c</sup>

*A.*, *B.*, and others, were owners of a ship. *B.* was managing owner, and employed *C.* as his agent for general purposes, and amongst others to receive moneys on account of the ship, and *C.* kept an account with *B.* as such managing owner. To obtain money due on account of the ship, it was necessary that the receipt should be signed by one of the owners besides the managing owner; and upon a receipt signed by *B.* and one of the other owners, *C.* received on account of the ship 2,000*l.* and placed it to the credit of *B.* as managing owner; held, that an action for money had and received would not lie on the

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*L.* 293;) where the agent paid the money to the person for whose use it was remitted, after the principal had countermanded his order; held, that the agent was liable to the principal for the sum in this form of action. See also *Stewart v. Fry*, 7 Taunt. 339. (2 Eng. C. L. 129.)

<sup>a</sup> *Wedlake v. Hurley*, 1 C. & J. 83.

<sup>b</sup> *De Bernalas v. Fuller*, 14 East, 590. But where money was received with directions to pay it to another, in discharge of a bill, and the order was revoked before payment, the receiver being directed to hold it for a different purpose; held, that the holder of the bill could not recover it as money had and received to his use. *Stewart v. Fry*, 7 Taunt. 339. (2 Eng. C. L. 129.)

<sup>c</sup> *Stephens v. Badcock*, 3 B. & Ad. 354. (23 Eng. C. L. 93.) So where *A.*, an agent, gave a receipt for his principal, *B.*, and signed it "*A.* for *B.*;" held, that an action would not lie against *A.* for the money so received. *Edden v. Read*, 3 Campb. 339. *Rogers v. Kelly*, 2 Campb. 123.

the person whose money it lawfully is and the person who has received it. *Camp v. Tompkins*, 9 Conn. 553.)

part of the other owners to recover this sum from *C.*, as he had received it as the agent of *B.*, to whom alone he was accountable for it, and there was no *privity* between the other part owners and *C.*<sup>a</sup> \*52

The plaintiffs in London and the defendants at Hamburg, were correspondents of *J. and Co.*, of Rio, who informed the plaintiffs that they had directed the defendants to pay the proceeds of certain coffee to them, after a sale had been ratified. The plaintiffs wrote to the defendants on the subject, who replied in these words: "We are directed by *J. and Co.*, to remit to you the proceeds of 100 bags of coffee which they consigned to us, but which are not yet disposed of;" held, that this answer was evidence of a consent, on the part of the defendants, to hold the proceeds of the coffee for the use of the plaintiff, and that the amount was recoverable in an action for money had and received.<sup>b</sup>

But if the defendant has consented to hold the money for the use of the plaintiff, he is liable.

6.—*Assignment of debts by arrangement.*] If *A.* be indebted to *B.*, and *B.* is indebted to *C.* in an equal amount, and it is agreed between them that *A.* shall pay *C.* what he owes to *B.*, *C.* may maintain an action for money had and received against *A.*; but to sustain such an action the agreement must be such, that the debt which *B.* owes to *C.* is thereby extinguished, and it must be such as would be recoverable in an action for money had and received.

Suppose *A.* owes *B.* 100*l.* and *B.* owes *C.* 100*l.*, and the three meet, and it is agreed between them that *A.* shall pay *C.* the 100*l.*, *B.*'s debt is extinguished, and *C.* may recover that sum against *A.*<sup>c</sup> So, where the plaintiffs were creditors and the defendants debtors to *T. and Co.*, and by consent of all parties an arrangement was made that the defendants should pay to the plaintiffs the debt due from them to *T. and Co.*; held, that as the demand of *T. and Co.* on defendants was for money had and received, the plaintiffs were entitled to recover on a count in that form.<sup>d</sup> Where *A.* was indebted to *B.* for \*brokerage, and *B.* was indebted to *C.* for money lent, and *B.* gave an order to *A.* to pay *C.* the sum due from *A.* to *B.*, as a security on which *C.* lent *B.* a further sum, and the order was accepted by *A.*, held that on *A.*'s refusal to comply with the order, *C.* might maintain an action for money had and received against him.<sup>e</sup> \*53

<sup>a</sup> *Sims v. Brittain*, 4 B. & Ad. 375. (24 Eng. C. L. 78.)

<sup>b</sup> *Fruhling v. Schroeder*, 2 Bing. N. C. 77. (29 Eng. C. L. 260.) 1 Hodg. 105. 7 C. & P. 103.

<sup>c</sup> Per Buller, J., *Tatlock v. Harris*, 3 T. R. 180, recognised in *Wharton v. Walker*, 4 B. & C. 166. (10 Eng. C. L. 303.)

<sup>d</sup> *Wilson v. Coupland*, 5 B. & Ald. 228. (7 Eng. C. L. 76.)

<sup>e</sup> *Israel v. Douglas*, 1 H. Bl. 239. *Wilson, J.*, differed from the rest of the court in this case; and in *Taylor v. Higgins*, 3 East, 171, *Lawrence, J.*, said that it had been since mentioned in the Court of King's Bench, and not approved of. In *Wharton v. Walker*, 4 B. & C. 165, (10 Eng. C. L. 302,) *Bayley, J.*, said: "In the present

Where *J.* being indebted to *S.*, and *R.* being indebted to *S.* and also to *J.*, it was verbally agreed between the three, that *S.* should transfer the debt due to him from *J.* to the account of *R.*; and *S.* in pursuance of such agreement delivered to *R.* an account of which he (*R.*) was charged with the debt due from *J.* to *S.*; held, that *J.* was not thereby discharged, for *S.* did not say or do any thing which had the effect of discharging *J.* It was an accord only, but not a satisfaction.<sup>a</sup>

The plaintiff cannot recover unless the debt be extinguished.

*A.* being indebted to *B.*, gave him an order on his tenant *C.* to pay the amount out of the next rent that would become due. *B.* sent the order to *C.*, but had not any direct communication with him upon the subject. At the next rent day *C.* produced the order to *A.* and promised to pay the amount to *B.*, and upon receiving the difference between that and the whole rent *A.* gave a receipt for the whole; held, that *B.* could not recover the amount of the order from *C.* in an action for money had and received, because the debt due from *A.* was not *extinguished*, and the tenant (the defendant) *had received no money* for the use of *B.*<sup>b</sup>

\*54

It has been held, that where it has been admitted and agreed beyond dispute, that a defined and ascertained sum is due from *A.* to *B.*, and that a larger sum is due from *C.* to *A.*, and the three agree that *C.* shall be *B.*'s debtor instead of *A.*, and *C.* \*promises to pay *B.* the amount owing to him by *A.*, an action will lie by *B.* against *C.*<sup>c</sup>

But where *S.* was indebted to *J.*, and *G.* was indebted to *S.* and *S.* requested *G.* to pay *J.* whatever was due from *G.* to *S.* and *G.* promised to do so when the amount was ascertained; and *after* the amount had been ascertained, and before it was paid, *S.* became a bankrupt; held, that *J.* might claim from *G.* the amount of the debt, for there was an equitable assignment of the debt due from *G.* to *S.*, which bound the assignees of the latter.<sup>d</sup>

A pauper's weekly allowance stopped by overseers by agreement.

Where an overseer stopped part of a pauper's weekly allowance, and engaged to pay it over to the landlord of the pauper, in pursuance of an understanding between the three; held, that the landlord could not recover it from the overseer, as money had and received to his use: for the defendant was not at any time a debtor to the pauper; neither had the pauper at any time a *legal right* to the money which the defendant stopped; and as the pauper himself could not support a count for money

case no money was ever had and received by the defendant to the use of any person, which objection existed in *Israel v. Douglas*, and has caused the propriety of that decision to be since doubted."

<sup>a</sup> *Cuxon v. Chadley*, 3 B. & C. 591. (10 Eng. C. L. 191.)

<sup>b</sup> See *Noy v. Reynolds*, 1 Ad. & El. 159. (28 Eng. C. L. 58.) *Wharton v. Walker*, 4 B. & C. 163. (10 Eng. C. L. 302.)

<sup>c</sup> Per Lord Tenterden, C. J., in *Fairlie v. Denton*, 8 B. & C. 400. (15 Eng. C. L. 247.) This is an exception to the general rule of law, that a *chose* in action cannot be assigned. *ib.*

<sup>d</sup> *Crowfoot v. Gurney*, 9 Bing. 372. (23 Eng. C. L. 309.)

had and received to his use, the plaintiff, who claimed under him, could not sustain such an action.<sup>a</sup>

Where the plaintiff, a stock-jobber, sold for the defendant some foreign securities and paid him the amount, but it having been discovered that the securities were unmarketable, the plaintiff reimbursed the purchaser; held, that he might recover from the defendant the amount paid to him for the securities, in an action for money had and received.<sup>b</sup> But where the defendant, a captain of the plaintiff's ship, drew at Rio de Janeiro a bill on the plaintiff's agent for disbursements, which was paid by the agent, in London, when due; held, that the plaintiff could not maintain an action for money had and received for the amount, without evidence that money came to the defendant's hands.<sup>c</sup>

7.—*To recover money paid under a mistake of facts or of law.*] In general, money paid by a party under a mistake of facts may be recovered back; particularly if he has not the means of knowledge in his power; but money voluntarily paid under a misapprehension of the legal rights of the party cannot be recovered.(1)

Where a person indebted to the estate of a bankrupt paid the entire debt to the assignees, without setting off a sum of money due to himself from the bankrupt; held, that he might recover the sum which he was entitled to set off, in an action for money had and received against the assignees. Lord Mansfield, C. J., observed, that the rule had always been, "that if a man has actually paid what the law would not have compelled him to \*pay, but what in equity and conscience, he ought, he cannot recover it back in an action for money had and received. So where a man has paid a debt which would otherwise have been barred by the statutes of limitations; or a debt contracted during his infancy, which in justice he might discharge though the law would not have compelled payment; yet, the money being paid, it will not oblige the payee to refund it. But where money is paid under a mistake, which there is no ground to claim in conscience, the party may recover it back again in this form of action."<sup>d</sup>

Where a bill of exchange was drawn in Ireland upon the stamp required by law, which was less in amount than the stamp required for such a bill drawn in England, but there was nothing on the face of the bill to show that it had been drawn in Ireland. The holder in England neglected to present it for payment, and held it a month after it was due. The acceptor having become bankrupt, the holder applied for payment to

<sup>a</sup> Blackledge v. Harman, 1 M. & Rob. 344.

<sup>b</sup> Youg v. Cole, 3 Bing. N. C. 724.

<sup>c</sup> Bize v. Dickason, 1 T. R. 285.

<sup>d</sup> Scott v. Miller, 3 Bing. N. C. 811.

(1) (*Burr v. Veeder*, 3 Wend. 412.)

the indorser who refused to pay it, alleging that the holder had made it his own by his laches; but on being threatened to be sued on the ground that it was drawn on an improper stamp, which he perceived to be lower in value than the stamp which was required for a bill of the same amount drawn in England, and, being ignorant of the fact that it had been drawn in Ireland, he paid the amount to the holder; held, that he might recover it back again from the holder in an action for money had and received. Bayley, J.: "There is no doubt as to the rule of law applicable to this case. If a party pay money under a mistake of law, he cannot recover it back; but if he pay money under a mistake of the real facts, and no laches are imputable to him, (in respect of his omitting to avail himself of the means of knowledge within his power,) he may recover back such money. The plaintiff at the time he made the payment had no adequate means of knowing that it was a void bill; that being so, it is quite clear that this money was paid under a mistake of fact, and without any laches on the part of the plaintiff; for these reasons, I think he is entitled to recover it back."<sup>a</sup>

\*56  
Rent  
wrongful-  
ly paid.

\*A tenant having paid rent to *A.* was ejected at the suit of a third person, who afterwards recovered from him the usual profits for the period in respect of which he had paid rent to *A.*; held that the tenant might recover back that rent from *A.* in an action for money had and received, *A.* not having set up any title to the premises at the trial.<sup>b</sup>

Where the  
circum-  
stances  
are con-  
cealed.

Where the father of a bastard child, on whom an order of filiation had been made, paid several sums in pursuance of the order to an overseer. The child had been placed in the Foundling Hospital, and was there supported during the periods for which the payments were made. The plaintiff was ignorant of those facts, and was refused information respecting the child. Held, that he was entitled to recover back those moneys as having been paid by mistake and under a concealment of the circumstances.<sup>c</sup> If a sheriff sells goods under a *fi. fa.*, and pays over the proceeds to the plaintiff in ignorance of an act of bankruptcy committed by the defendant in the action, and he is afterwards bound to pay the amount to the assignees, he may recover it from the plaintiff in the original suit as money paid in ignorance of the facts.<sup>d</sup> So if the sheriff pays the money to the plaintiff with knowledge of the act of bankruptcy, the assignees may recover it from the sheriff,<sup>e</sup> or from the plaintiff,<sup>f</sup> in this form of action. Where money was paid on account, and a dispute afterwards arose between the parties, upon which a balance was struck not including the money previously

<sup>a</sup> Milnes v. Duncan, 6 B. & C. 671. (13 Eng. C. L. 293.)

<sup>b</sup> Newsome v. Graham, 10 B. & C. 234. (21 Eng. C. L. 63.)

<sup>c</sup> Hodgson v. Williams, 6 Esp. 29.

<sup>d</sup> Brydges v. Walford, 6 M. & S. 42.

<sup>e</sup> Notley v. Buck, 8 B. & C. 160. (15 Eng. C. L. 178.)

<sup>f</sup> Per Lord Tenterden, *id.* 165.

paid, and the plaintiff by mistake paid the whole balance; held, that he might recover back the money paid on account.<sup>a</sup>

But if a party voluntarily pays money to another with a full knowledge of the facts of the case, or with the means of such knowledge in his hands, he cannot recover it back again on account of his ignorance of the law. (1)

Money paid with knowledge of the facts.

As where money had been paid by an underwriter as for a loss by capture, after he had been apprised of a material fact, which would have afforded him a good defence, but of the legal \*effect of which he was not aware at the time; held, that he could not recover it back.<sup>b</sup> So where the captain of a king's ship brought home in her public treasure, and treasure of individuals for his own emolument; he received freight for both and paid over one-third of it to the admiral according to usage. On learning that the admiral was not by law entitled to one-third of the freight, he brought an action against the executrix of the admiral to recover it back; but the court (Chambre, J., diss.) held, that he could not recover back the private freight, because the whole of that transaction was illegal, nor the public freight because he had paid it with full knowledge of the facts, although in ignorance of the law, and because it was not against conscience for the executrix to retain it.<sup>c</sup>

\*57

Money paid by mistake to the trustees of an insolvent estate cannot be recovered from them after they have made a final dividend.<sup>d</sup> *A.* pays a sum of money into a banker's for a specific purpose; the banker's clerk by mistake pays this money to *B.*, who has no right to it; held, that *A.* cannot maintain an action against *B.* to recover it back, for there is no privity between them.<sup>e</sup> So where *A.* in the country drew a bill upon *B.*, making it payable at the house of *C.* in London, without authority from *C.*, and *B.* accepted the bill without giving notice to *C.* When the bill, (it having been negotiated,) was presented for payment at the house of *C.*, *C.* paid it under the supposition that it was another bill drawn by *B.*, and accepted by himself. *B.* having become a bankrupt, it was held that *C.* could not recover from *A.* the amount of the bill as money had and received; for the bill having been negotiated, the money was received by the holder and not by *A.*, and the holder could not be considered *A.*'s agent in respect of that transaction.<sup>f</sup> So where money was paid by a party under a mistake of facts, which were within his knowledge, but which

Money paid on a bill by mistake.

<sup>a</sup> *Lucas v. Worswick*, 1 M. & Rob. 293.

<sup>b</sup> *Bilbie v. Lumley*, 2 East, 469.

<sup>c</sup> *Brisbane v. Dacres*, 5 Taunt. 143. (1 Eng. C. L. 43.)

<sup>d</sup> *Fydell v. Clark*, 1 Esp. 447.

<sup>e</sup> *Rogers v. Kelly*, 2 Campb. 123.

<sup>f</sup> *Davies v. Watson*, 2 Nev. & M. 709. (28 Eng. C. L. 377.)

(1) (*Elliott v. Swartwout*, 10 Peters, 137. But ignorance of law signifies ignorance of the law of one's own country. *Juris ignorantia est cum jus nostrum ignoramus*. Ignorance of the law of a foreign government is ignorance of fact. In this respect the United States stand to each other in the relation of foreign states. *Haven v. Foster*, 9 Pick. 112.)



he had then forgotten; it was held that he might recover it in this form of action.<sup>a</sup>

**\*58**      **\*8.—*Money paid on a forged instrument.***] If a party exercising due caution, has by mistake paid money on a forged instrument, and has been guilty of no laches whereby the rights of a third party have been affected, he may recover back the sum so paid in an action for money had and received.

Where the plaintiff discounted a forged navy bill for the defendant, both parties being at the time ignorant of the forgery, held, that he might recover the amount in an action for money had and received.<sup>b</sup> So where the plaintiffs, who were bill brokers, discounted for the defendant a bill of exchange, which the latter did not indorse, and the signatures of the drawer and acceptor (the latter of whom kept an account with the plaintiffs,) turned out to be forged, held that the plaintiff might recover the sum so paid from the defendant, though the latter had paid it over to the indorser, for whom he was broker.<sup>c</sup> So where a banker through mistake paid a bill for the honor of a customer, whose name was forged, (such bill having been presented to him as bearing the genuine indorsement of such customer,) and having on the same day discovered the forgery, he immediately gave notice thereof to the holder, and demanded to have the money repaid; held, that he might recover it back from the holder, as money paid by mistake, the mistake having been discovered in time to give notice to the indorsers, and before the holder had lost his remedy against them, so that no person was discharged by laches: besides it was partly the fault of the holder that the plaintiff had made the mistake, for his calling for payment on the latter, for the honor of an indorser, was by no means a matter of course.<sup>d</sup>

A forged bill paid by a banker for the honor of a customer.

If an acceptor pays a bill where the signature of the drawer is forged, he has no remedy.  
**\*59**      Where a man, on whom two bills of exchange falling due at different times were drawn, paid the first when presented at maturity not having accepted it, and accepted and paid the second under a mistaken opinion that the signature of the supposed drawer was genuine; some time afterwards it was discovered that the signature of the drawer was forged; held, that he could not recover back the money, as paid by mistake, for it was not unconscientious in the defendant to retain it, as he was an innocent holder of the bill for a valuable consideration, and the acceptor ought to know the handwriting of the drawer.<sup>e</sup>

<sup>a</sup> Lucas v. Worswick, 1 M. & Rob. 293.

<sup>b</sup> Jones v. Ryde, 5 Taunt. 488. (1 Eng. C. L. 166.) Bruce v. Bruce, 5 Taunt. 495, (1 Eng. C. L. 170,) S. P.

<sup>c</sup> Fuller v. Smith, R. & M. 49. (21 Eng. C. L. 379.)

<sup>d</sup> Wilkinson v. Johnston, 3 B. & C. 428. (10 Eng. C. L. 140.) Besides, the bill was taken to the plaintiff, and presented to him as a bill bearing the genuine indorsement of his customer. Per Bayley, J., Cocks v. Masterman, 9 B. & C. 907. (17 Eng. C. L. 518.) See Johnson v. Windle, 3 Bing. N. C. 225. *post*.

<sup>e</sup> Price v. Neale, 3 Burr. 1354. In reference to this case, Lord Tenterden said, in Wilkinson v. Johnston, 3 B. & C. 434, (10 Eng. C. L. 142,) *supra*, "The decision



So where a banker, at whose house a bill purporting to be accepted by one of his customers was made payable, paid the amount to a *bonâ fide* holder, and did not discover until a week afterwards that it was a forgery; held, that he could not recover the sum paid from such holder, for he ought to know the signature of his customer, and by his delay in discovering the mistake, he deprived the holder of a remedy against the other parties to the bill.<sup>a</sup> So where a bill purporting to be accepted by A. was presented for payment to his bankers on the day that it became due; the banker believing it to be genuine paid the amount, but on the following day, having discovered it to be a forgery, he gave notice of that fact to the party to whom he paid the bill, and required him to return the money; held, that the banker could not recover it back, for the holder was entitled to know on the day that the bill became due, whether it was honored or dishonored; for though the holder is not bound by law to take any steps against the other parties to the bill till the day after it is dishonored, still he is entitled to do so on the day that it becomes due, if he thinks fit, and the parties who pay the bill ought not by their negligence to deprive the holder of any right or privilege.<sup>b</sup>

A banker ought to know the signature of his customer; therefore, if he pays money on his forged signature, the customer is not liable for it.

Where a check drawn by a customer upon his banker for a sum of money described in the body of the check in words and figures, was afterwards unlawfully altered by the holder, who substituted a larger sum for that mentioned in the check, but in such a manner that no person in the ordinary course of business \*could observe it, and the banker paid the larger sum to the owner; held, that he could not charge the customer for any thing beyond the sum for which the check was originally drawn, there being no genuine order or authority to pay more.\*

\*60

It has been held, that a party, whose stock was sold under a forged power of attorney, might maintain an action for money had and received against the innocent *partners* of the forger, who received the proceeds of the sale.<sup>d</sup>

9.—*On failure of consideration.*] Money paid on a consideration which subsequently failed, may in general be recovered in an action for money had and received.(1)

Where a deed for granting an annuity was set aside for in-

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of Lord Mansfield against the plaintiff appears not to have been founded on the delay, but rather upon the general principle, that an acceptor is bound to know the handwriting of the drawer, and that it is rather by his fault, or negligence, than by mistake, if he pays on a forged signature."

<sup>a</sup> *Smith v. Mercer*, 6 Taunt. 76. (1 Eng. C. L. 312.) See *Young v. Grote*, 4 Bing. 258. (13 Eng. C. L. 420.) *Post. Bills of Exchange, Forgery.*

<sup>b</sup> *Cocks v. Masterman*, 9 B. & C. 902. (17 Eng. C. L. 517.)

<sup>c</sup> *Hall v. Fuller*, 5 B. & C. 750. (12 Eng. C. L. 368.) See *Young v. Grote*, 4 Bing. 258, (12 Eng. C. L. 420.) *post.*

<sup>d</sup> *Marsh v. Keating*, 1 Bing. N. C. 198, (27 Eng. C. L. 354,) in error, in the House of Lords.

(1) (See *Parish v. Stone*, 14 Pick. 210.)

Annuities set aside for informality.

\*61

Subscriptions received by a public company towards a scheme which failed.

If the plaintiff has de-

formality in registering the memorial; held, that an action for money had and received would lie to recover back the purchase-money.<sup>a</sup> So where several deeds were given for securing an annuity, and one of them was cancelled by direction of the court, as being improperly described in the memorial; held, that the grantee might recover back the consideration money, on the ground that the assurance which he had contracted for, had not been given to him.<sup>b</sup> And even if the annuity had not been actually set aside, the grantee may recover the purchase-money, if the grantor has communicated to him that the memorial is defective, and has, for that reason, treated for a compromise.<sup>c</sup> Where an annuity was granted for more than six years before the action was brought, but was treated by the grantor as valid and subsisting within that period, the court held, that the statute of limitations did not begin to run until the annuity had been avoided.<sup>d</sup> The defendant may, in these cases, deduct the payments made by him in respect of the annuity, and for more than six years, unless the plaintiff reply the statute of limitations.<sup>e</sup> But where *A.* purchased an \*annuity for his life, which was regularly paid up to the time of his death, but no memorial of the grant of the annuity was enrolled; held, that *A.*'s executrix could not, on that ground, insist that the contract was void, and recover back the consideration money paid for the annuity, for the contract had been fully executed, and it would be against equity and good conscience that the money should be recovered.<sup>f</sup>

Where a scheme for establishing a tontine was put forth, stating that the money subscribed was to be laid out at interest, and after some subscriptions had been paid to the directors, but before any part of the money was laid out at interest, the directors resolved to abandon the project; held, that each subscriber might recover the whole of the money advanced by him, without the deduction of any part towards payment of the expenses incurred; for as the scheme proved abortive, the expense should fall on the original projectors, and not on those who advanced their money on the faith of its going on.<sup>g</sup>

Where some act is to be done by each party, under a special agreement, and the defendant by his neglect prevents the plaintiff carrying the contract into execution, the plaintiff may, in this form of action, recover back the money he has paid under it.<sup>h</sup> But if the contract has been in part performed, and the plaintiff has derived any benefit from it, this action cannot be maintained.<sup>i</sup> (1) Where a party sold a patent right, which after-

<sup>a</sup> *Shove v. Webb*, 1 T. R. 732.

<sup>b</sup> *Scurfield v. Gowland*, 6 East, 241.

<sup>c</sup> *Waters v. Mansell*, 3 Taunt. 56.

<sup>d</sup> *Cowper v. Godmond*, 9 Bing. 748. (23 Eng. C. L. 452.)

<sup>e</sup> *Hicks v. Hicks*, 3 East, 16.

<sup>f</sup> *Davis v. Bryan*, 6 B. & C. 651. (13 Eng. C. L. 290.)

<sup>g</sup> *Nockells v. Crosby*, 3 B. & C. 814. (10 Eng. C. L. 237.)

<sup>h</sup> *Giles v. Edwards*, 7 T. R. 181.

<sup>i</sup> *Hunt v. Silk*, 5 East, 449.

(1) (If the party, entitled to repudiate a contract because it has not been performed in rea-

wards turned out to be invalid, held that the vendee, who had derived a benefit from the use of the patent for some time, could not recover back from the vendor the price which he gave for it.<sup>a</sup> (1) So where the master and part owner of a vessel agreed to purchase the moiety of his partner, and having paid the purchase-money and received the title-deeds, which he deposited as a security with a third person, had the entire possession of the vessel given up to him, but his partner afterwards refused to execute a bill of sale; held, that an action for money had and received could not be maintained \*to recover the purchase-money.<sup>b</sup> If a fixed sum be paid to parish officers, for the future maintenance of a bastard child, and the child die, the surplus beyond the expenditure may be recovered in this form of action.<sup>c</sup>

rived any benefit from the contract, he cannot recover money paid on it.

\*62

Where the father of an illegitimate child paid to the defendants, as parish officers, a certain sum to exonerate him from the charge of its maintenance, and the child died whilst they were in office; held, that he might recover from them the surplus beyond the expenditure, in an action for money had and received, after they had quitted office, although they had handed it over to their successors. The court expressed a strong opinion that the contract was altogether illegal, and that the whole sum was money had and received by the defendants to the plaintiff's use.<sup>d</sup>

If a party enter at a horse-race a disqualified horse, knowing it to be so, he cannot, at least after the race, recover back his stake from the clerk of the course, as money had and received, upon the ground that the horse never could have won the race.<sup>e</sup>

Stake on a horse-race.

A. contracted with B. for the purchase of the good-will of a public-house, for the sum of 120*l.*, of which 50*l.* were paid down, and the remainder was to be paid when B. should procure the landlord's consent to receive A. as his tenant. The landlord having refused his consent; it was held, that A. might recover back the deposit in this form of action; for it was a conditional contract, depending on the consent of the landlord being obtained, and the landlord having refused his consent, A. might rescind it; and there being a failure of consideration, he was entitled to have his money refunded.<sup>f</sup>

Where the contract is rescinded.

10.—*Obtained by fraud or duress.*] Whenever the defendant has received money belonging to the plaintiff under

<sup>a</sup> Taylor v. Hare, 1 N. R. 260.

<sup>b</sup> Beed v. Blandford, 2 Y. & J. 278.

<sup>c</sup> Townson v. Wilson, 1 Campb. 396. Watkins v. Hewlett, 1 B. & B. 1. (5 Eng. C. L. 1.) See Cole v. Gower, 6 East, 110. Clarke v. Johnson, 3 Bing. 424. (13 Eng. C. L. 33.) Wilde v. Griffin, 5 Esp. 141.

<sup>d</sup> Chappell v. Poles, 2 Mees. & Wels. 867.

<sup>e</sup> Wellar v. Deakins, 2 C. & P. 618. (12 Eng. C. L. 291.)

<sup>f</sup> Wrighton v. Newton, 1 Gale, 67. 2 C. M. & R. 124.

reasonable time, does any act which amounts to an admission of the existence of the contract, he cannot afterwards elect to treat it as void. Brinley v. Tibbets, 7 Greenleaf, 70.)

(1) (See Williams v. Hinks, 2 Verm. 26.)

any fraud, false color, pretence, deceit, duress, extortion, or oppression, the plaintiff may recover it in an action for money had &c., for he may waive the *tort*, and rely on the contract which the law in such cases implies for him.

\*63  
Sale of  
public of-  
fices.

If money has been obtained by means of fraud, an action for money had and received lies to recover it back; and it is no answer to such an action, that the defendant is really entitled to the money, if his right to it depends upon a question, not of common law jurisdiction, as where a legatee obtained payment \*from an executor through fraud.<sup>a</sup> A sale of goods effected by fraud does not change the property in them; therefore, where the defendant fraudulently induced the plaintiff to sell goods to *J. S.*, who could not pay for them, and the proceeds of such goods eventually came into the hands of the defendant, in satisfaction of a debt due to him from *J. S.*; held, that the plaintiff was entitled to recover them in an action for money had and received.<sup>b</sup> If *A.* fraudulently procure a bill of exchange from *B.*, and afterwards becomes a bankrupt, and his assignees receive the amount, *B.* may recover from them in an action for money had and received.<sup>c</sup> Where *A.* advances money to *B.* to be returned to him in three months, unless *B.* within that time procure an appointment which *B.* knows to be unattainable, *A.* may recover the amount without waiting for the expiration of the three months.<sup>d</sup>

Action by  
attorney  
without  
authority.

If an attorney without any authority bring an action in the name of *A.*, (a nominal or imaginary plaintiff,) against *B.*, and the latter pay the costs of the writ to the attorney, he may recover the amount back from the attorney, in an action for money had and received.<sup>e</sup> But if a party has been fraudulently induced to enter into a contract, and after he has discovered the fraud, pays money under it with a full knowledge of the facts, he cannot recover it under this count.<sup>f</sup>

Money ob-  
tained by  
compul-  
sion.

If the defendant, having taken advantage of the plaintiff's situation, obtain money from him by compulsion, to which in justice he is not entitled, the plaintiff may recover it back in this form of action. A voluntary payment of an illegal demand to redeem the person or the goods, may be the subject of an action for money had and received.<sup>g</sup>(1) If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other, unless the

<sup>a</sup> *Croc & cide*. Winter, 1 Campb. 124.

<sup>b</sup> *Abbotts v. Barry*, 5 Moore, 98. 2 B. & B. 369. (6 Eng. C. L. 157.)

<sup>c</sup> *Harrison v. Walker*, Peake, 111. *Semble*, that this action lies against an infant for money embezzled by him. *Bristow v. Eastman*, *id.* 223.

<sup>d</sup> *Hogan v. Shee*, 2 Esp. 522.

<sup>e</sup> *Dupen v. Keeling*, 4 C. & P. 102. (19 Eng. C. L. 295.) *Robson v. Eaton*, 1 T. R. 62.

<sup>f</sup> *Miles v. Dell*, 3 Stark, 25. (14 Eng. C. L. 150.)

<sup>g</sup> Per Lord Kenyon, in *Fulham v. Down*, 6 Esp. 26; recognised by Pattenon, J., in *Cadaval v. Collins*, 6 N. & M. 329, *infra*.

(1) (*Chase v. Dwinal*, 7 Greenleaf, 134.)

latter \*pays him a sum of money which he has no right to receive, and the latter in order to obtain possession of his property pays that sum, the money so paid is a payment by compulsion, and may be recovered back.<sup>a</sup>

Where the plaintiff pawned plate with the defendant, and the latter would not part with it, unless the plaintiff paid him illegal interest; held, that the excess paid to redeem the goods, might be recovered back in an action for money had and received.<sup>b</sup> So where the plaintiff (a publican) paid a fee (not legally due) in order to get his license.<sup>c</sup> So where a toll-gate keeper exacts an illegal toll.<sup>d</sup> So where the defendant obtained from the plaintiff a sum of money to compromise a *qui tam* action for usury.<sup>e</sup> So where a broker received illegal and excessive charges on a distress for rent.<sup>f</sup> So where a sheriff exacts a larger fee than he is entitled to.<sup>g</sup> So it lies to recover money levied by an overseer of the poor, and remaining in his hands under a conviction subsequently quashed.<sup>h</sup>

Redeeming pawned goods.

But money obtained by *compulsion* of legal process, *i. e.* by Money a legal *judgment* obtained in a court of justice, is not recover- paid by able back, although it be afterwards discovered that it was not process of due; for after recovery by process of law there must be an end law is not of litigation, otherwise there would be no remedy for any per- recover- son.<sup>i</sup> "If a party pays money under compulsion of law, it is not recoverable back. I would go further: if a party thinking a debt is due to him, arrests another, and receives money which in truth is not due to him, that \*cannot be recovered again; but there must be *bona fides* on the part of the person receiving the money."<sup>j</sup>(1)

\*65

But if a person maliciously and without probable cause arrests another for a debt, and thereby obtains money, it may be recovered from him in this form of action.

As where the defendant made a claim on the plaintiff which he *knew to be unfounded*, and had the latter arrested on such claim, and the plaintiff paid a portion of the demand in order to procure his discharge, and engaged to put in bail for the re- If paid through an abuse of legal pro-

<sup>a</sup> Per Bayley, J., in *Shaw v. Woodcock*, 7 B. & C. 84. (14 Eng. C. L. 18.)

<sup>b</sup> *Astley v. Rogers*, 2 Stra. 915.

<sup>c</sup> *Morgan v. Palmer*, 2 B. & C. 729. (10 Eng. C. L. 232.)

<sup>d</sup> *Wightw.* 22. See *Lewis v. Hammond*, 2 B. & A. 206. *Waterhouse v. Keen*, 4 B. & C. 200. (10 Eng. C. L. 310.) Where a revenue officer seized goods as forfeited, which were not liable to seizure, and took money from the owner to release them, the latter may recover it back in this form of action. *Irving v. Watson*, 4 T. R. 485.

<sup>e</sup> *Williams v. Hedly*, 8 East, 378.

<sup>f</sup> *Hills v. Street*, 5 Bing. 57. (15 Eng. C. L. 358.)

<sup>g</sup> *Dew v. Parsons*, 2 B. & A. 568.

<sup>h</sup> *Feltham v. Terry*, 1 T. R. 187. B. N. P. 131.

<sup>i</sup> *Marriott v. Hampton*, 7 T. R. 269. Per Coleridge, J., in *Cadaval v. Collins*, 6 N. and M. 332.

<sup>j</sup> Per Patteson, J., *id.* 331; and per Holroyd, J., in *Milnes v. Duncan*, 6 B. & C. 679. (13 Eng. C. L. 296.)

(1) (*Stouffer v. Latshaw*, 2 Watts, 167.)

cess, it  
may be re-  
covered  
back.

mainder; it was held that the plaintiff might recover back the sum so paid, in an action for money had and received, though he might have also recovered it in an action for a malicious arrest, for it was not a payment in the ordinary course, under process of law; but the process of the law was colorably made use of, for the purpose of extorting money.<sup>a</sup>

Voluntary  
payment.

But if a party with a full knowledge of the facts *voluntarily* pay a demand unjustly made on him, and threatened to be enforced by legal proceedings, he cannot consider the money to be paid by compulsion, and recover the same back again, though he paid it under a protest.<sup>b</sup> So if the money be paid after bailable process is sued out, though not prosecuted to judgment, if the claimant act *bona fide*.<sup>c</sup> So where money has been paid for the release of cattle, taken *damage feasant*, although the distress were wrongful, it cannot be recovered in this form of action; for replevin or trespass is a more convenient remedy.<sup>d</sup>

This action is not maintainable to recover money paid into court by mistake in an action, under the common rule;<sup>e</sup> nor money levied under a *fi. fa.* which was only *practically* irregular, and has not been set aside.<sup>f</sup>

\*66

\*11.—*Money paid on an illegal contract.*] The rule in respect of money paid on illegal contracts appears in general to be, that money so advanced may be recovered back in an action for money had and received, while the contract remains *executory*, because a violation of the law is thereby prevented; but if the contract be *executed*, it cannot be recovered back. Where *both parties* are in *pari delicto*,<sup>g</sup> in such a case *melior est conditio defendentis*, not because the defendant is more favored, but because the plaintiff must draw his justice from pure fountains.<sup>h</sup>(1)

Where one knowingly pays money on an illegal consideration he is *particeps criminis*, and there is no reason he should

<sup>a</sup> Cadaval (Duke of) v. Collins. 6 N. & M. 324. In this case the jury found that the defendant knew that he had no just claim. The *onus* lies on the party seeking to recover the money back, to show that he has paid it in consequence of the fraud of the other party. Per Patteson, J., *id.* 331.

<sup>b</sup> Brown v. M'Kinally, 1 Esp. 279. Hodgson v. Williams, 6 Esp. 29. Falham v. Down, *id.* 26.

<sup>c</sup> Hamlet v. Richardson, 9 Bing. 644, (23 Eng. C. L. 407,) which is stated in 6 N. & M. 329, to overrule Cobden v. Kendrick, 4 T. R. 431.

<sup>d</sup> Lindon v. Hooper, Cowp. 414.

<sup>e</sup> Malcolm v. Fullarton, 2 T. R. 645.

<sup>f</sup> Habberton v. Wakefield, 4 Camp. 58.

<sup>g</sup> Per Buller, J., in Lowry v. Bourdieu, Doug. 471, recognised by the court in Tappenden v. Randall, 2 Bos. & P. 471.

<sup>h</sup> B. N. P. 132, per Lord Mansfield, C. J., Doug. 470.

(1) (Where on an illegal contract one pays money to the other in furtherance of the contract, and the contract is executed by the accomplishment in part of the original design, leaving however a portion of the money advanced unexpended, an action will not lie to recover back the unexpended balance. *Perkins v. Garvige*, 15 Wend. 412.)



have his money again, for he parted with it freely and *volenti non fit injuria*.<sup>a</sup>

But where contracts or transactions are prohibited by positive statute for the sake of protecting one set of men from another set of men, the one from their situation and condition being liable to be oppressed or imposed upon by the other, *there* the parties are not in *pari delicto*; and in furtherance of these statutes the person injured, after the transaction is finished and completed, may bring his action and defeat the contract; the object of the statute being to protect the plaintiff.<sup>b</sup>

When the parties are not in *pari delicto*.

Where *A.*, in consideration of 200*l.* paid by *B.*, gave a bond for the payment of annuity to the latter of 100 guineas, until the hop duties should amount to a certain sum in one year. Before this event had taken place, *B.* brought an action for money had and received, to recover back from *A.* the consideration money, on the ground that the bond was illegal,<sup>c</sup> and the court held that the action was sustainable, as the contract was executory. Heath, J., said, that there ought to be a *locus penitentiae*, and that a party should not be compelled against his will to adhere to the contract.<sup>d</sup> Where a sum of money had been paid in order to procure a place in the custom-house; the \*place had not been procured, and the party who paid the money brought an action to recover it back; and it was held, that he should recover it because the contract was executory.<sup>e</sup>

While the contract is executory.

\*67

Where the plaintiff and the defendant were both lottery-office keepers, and during the drawing of the lottery, entered into an agreement mutually to insure the number of a ticket with each other, upon condition that he whose number should be drawn on the day next following the agreement, should receive from the other an undrawn ticket, or the value of it at the market price. The defendant's number being drawn, he chose the price of an undrawn ticket and received it; but when the plaintiff's number was drawn, the defendant refused to give him either an undrawn ticket or the value of one; whereupon the plaintiff brought an action for money had and received, to recover back the sum which he paid to the defendant on his number being drawn: and the court held, that as this species of contract was prohibited by 17 Geo. III, c. 46, and as the plaintiff was not only in *pari delicto*, but also stood in the light, and under the description of that species of insurer from whom the statute meant to protect the unwary, this action

When the parties are in *pari delicto*.

<sup>a</sup> B. N, P. 131.

<sup>b</sup> Per Lord Mansfield, C. J., in *Browning v. Morris*, Cowp. 792.

<sup>c</sup> See *Atherford v. Beard*, 2 T. R. 610, and *Shirley v. Sankey*, 2 B. & P. 130, as to the illegality of wagers on hop duties.

<sup>d</sup> *Tappenden v. Randall*, 2 Bos. & Pull. 467.

<sup>e</sup> *Walker v. Chapman*, cited by Buller, J., in *Lowry v. Bourdieu*, Dong. 471. But see *Norman v. Cole*, 3 Esp. 253, where a sum of money paid to procure a pardon for a convict, was held not to be recoverable back, though the pardon was not procured, on the ground that such services ought to be gratuitous, and not for money.



could not be maintained.<sup>a</sup> So where money deposited on an illegal wager was paid over to the winner by the consent of the loser; held, that the latter could not maintain an action against the former to recover back his deposit, because they were both *particeps criminis*, and the contract was executed.<sup>b</sup>

\*68 “There is no case \*to be found, said Lord Kenyon, “where money has been paid by one of two parties to another on an illegal contract, both being *particeps criminis*, an action has been maintained to recover it back again.” Money fairly lost at play cannot be recovered back in an action of debt for money had and received, not founded on the statute.<sup>c</sup> So where money had been paid by a parent to a master as a premium, under an indenture which was void, for not having the amount of premium inserted therein; it was held, that the parent could not recover it back again; as by executing the indenture he must be considered to be aware of its illegality, and therefore in *pari delicto* with the master; although the statute relative to the duties payable on such indentures impose a penalty on the master alone, for such omission.<sup>d</sup>

Premium with an apprentice where indenture is void.

Where the contract is merely void, but not criminal.

Usury.

But where the plaintiff insured some lottery tickets at the defendant's office, and having chances in his favor which the defendant refused to pay, on the ground that the contract was illegal by the statute 14 Geo. III, c. 76, and that plaintiff was *particeps criminis*; in an action for money had and received for the premium, the court held that the action was maintainable; for as far as the plaintiff was concerned, the contract on which he paid his money was not *criminal*, but merely *void*; and, therefore, having advanced his premium without any consideration, he was entitled to recover it back.<sup>e</sup> So where money was paid by *A.* to *B.* in order to compromise a *qui tam* action of usury brought by *B.* against *A.* on the ground of an usurious transaction between the latter and *E.*; held, that *A.* might recover it back again in an action for money had and received; for the prohibition and penalties of the statute 18 Eliz. c. 5, attach only to the informer, or other

<sup>a</sup> Lowry v. Bourdieu, Doug. 467.

<sup>b</sup> Howson v. Hancock, 8 T. R. 575, recognised by Bayley, J., in Hastelow v. Jackson, 8 B. & C. 225. (15 Eng. C. L. 205.) In Lacauassade v. White, 7 T. R. 535, the court came to a contrary determination, saying that it was more consonant to the principles of sound policy, that money paid on an illegal consideration should be recovered back, than, by denying the remedy, to give effect to the illegal contract: but the soundness of this decision was questioned by the court, in Vandyck v. Hewitt, 1 East, 98. In Williams v. Hedley, 8 East, 378, n., and in Hastelow v. Jackson, 8 B. & C. 225, (15 Eng. C. L. 205,) Bayley, J., says:—“Lacauassade v. White cannot be supported; it appears to have proceeded on the supposition that the defendant was a stake-holder, in which case it would have been right.” Yet, in Chitty on the law of contracts not under seal, 499, n., 2d ed., it is stated to be law.

<sup>c</sup> Thistlewood v. Cracroft, 1 M. & S. 500.

<sup>d</sup> Stokes v. Twitchen, 8 Taunt. 492. (4 Eng. C. L. 183.) Clayton v. Dilly, 4 Taunt. 165. Post. 77.

<sup>e</sup> Jaques v. Golightly, 2 Bl. 1073, recognised and acted upon in Jacques v. Wilthy, 1 H. Bl. 65.

person suing out process in the penal action making composition, and not upon the party making the \*composition, therefore the latter did not stand in this respect in *pari delicto* with the defendant.\*

SECTION IX.

MONEY PAID.

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1.—*When it lies in general.*] If one man pays or expends money for the use of another, he may, in general, recover it in an action for money paid. But to sustain such an action, it must appear that *money* has been paid by the plaintiff, at the *request* of the defendant, for his use; or in discharge of a debt for which the defendant was originally liable to a third party. In order to recover on this count, the plaintiff must show an express or implied assent of the defendant to the payment of the money, or that it was paid upon compulsion, or for the use of the defendant.<sup>b</sup>

The request may be express, “or implied,” first, from the subsequent assent of the defendant; secondly, from the payment being made under compulsion of law; and thirdly, from the defendant being under a legal obligation to pay the money advanced by the plaintiff.

The giving of a security to pay is not equivalent to actual payment: as where *A.* became surety for *B.*, who subsequently took the benefit of the insolvent debtors’ act, whereby *A.* was obliged to give a bond, and a warrant of attorney as a new security for the same debt; held, that he could not maintain an \*action against *B.*, as for *money paid*, for there was no pretence for considering it as money.<sup>c</sup> So where one of the makers of a joint and several promissory note, after the same had become due, gave his bond to the holder for the amount; held, that until he had *paid money* on the bond, he could not maintain an action for money paid against one of the other makers of the note, for contribution.<sup>d</sup> So where the plaintiff, being under

\*70

<sup>a</sup> Williams v. Hedley, 8 East, 378.  
<sup>b</sup> Per Tyndal, C. J., in Grissell v. Robinson, 3 Bing. N. C. 15, ante, 44, post, 73.  
<sup>c</sup> Taylor v. Higgins, 3 East, 169.  
<sup>d</sup> Maxwell v. Jameson, 2 B. & A. 51, recognised by Parke, J., in Power v. Butcher, 10 B. & C. 346. (21 Eng. C. L. 96.)

tenant to the defendant, had his goods sold under a distress by the head landlord, for rent due from the defendant; held, that he could not maintain an action for money paid, because no money passed from him, and the money paid by the purchaser became immediately vested in the landlord.<sup>a</sup>

At the request of the defendant.

If *A.* be indebted to *B.*, and *C.* pays the debt without the consent of *A.* express or implied, he cannot recover it from *A.* in an action for money paid, &c.; for *A.* may have a good reason to resist the payment of the money, and an assumpsit cannot be raised on the voluntary payment of a debt to another person without the knowledge or consent of the debtor.<sup>b</sup> On the same principle, where a broker contracted with others for the sale of stock, at a future day, by the authority of his principal, who afterwards refused to make good the bargain; held, that the broker having paid the difference, such third persons could not recover it, in an action for money paid from the principal.<sup>c</sup> So where the defendant contracted to sell stock on a certain day to the plaintiff, and on his refusal to transfer it, the plaintiff bought the stock himself, and sued the defendant in an action for money paid, for the difference in the price of the stock; held, that the action could not be maintained, his action being by a remedy on the contract.<sup>d</sup>

\*71

2.—*When paid by compulsion.*] But if there be no previous request, it will be implied from a subsequent assent upon the maxim *omnis rati habitio retrotrahitur et mandato equiparatur*. Or if the plaintiff be under a legal obligation to make the payment; or if money be paid, for the use of a person who is bound to pay it, under compulsion of law, a previous request will be implied.

Request implied.

Where the plaintiff at the request of the defendant's attorney paid money on account of the defendant, who was subsequently informed of the transaction and did not disclaim it; held, that the defendant was liable for money paid to his use, the jury having found that he had authorised his attorney to direct the payment.<sup>e</sup>

Goods of a stranger distrained.

Where the goods of a stranger which were on the premises of another were distrained by the landlord for rent; and the stranger in order to redeem them was forced to pay the rent;

<sup>a</sup> *Moore v. Pyrke*, 11 East, 52. "The count for money paid cannot be maintained, without proving actual payment, or what is equivalent to it," per Parke, J., *Power v. Butcher*, 10 B. & C. 346.

<sup>b</sup> *Stokes v. Lewis*, 1 T. R. 20. 1 Saund. 264, n. Per Lord Kenyon. *Exall v. Partridge*, 8 T. R. 310.

<sup>c</sup> *Child v. Morley*, 8 T. R. 610, per Lord Ellenborough, C. J. *Cumming v. Forrester*, 1 M. & S. 500. "No man can, by a voluntary payment of the debt of another, make himself that man's creditor, and recover from him the amount of the debt so paid. Perhaps the action would have been better framed *ex delicto* than *ex contractu*," per Lord Kenyon, C. J., 8 T. R. 613.

<sup>d</sup> *Lightfoot v. Creed*, 8 Taunt. 268. (4 Eng. C. L. 100.) 2 Moore, 255.

<sup>e</sup> *Parker v. Dubois*, 7 C. & P. 406.

held, that he might maintain an action for money paid to the use of the original lessees, from whom the rent was due to the landlord, as the payment was made by compulsion of law.<sup>a</sup> (1)

On the same principle, where the indorser of a bill of exchange being sued by the holder paid him part of the bill, the court held, on the authority of the preceding case, that he might recover the same from the acceptor in an action for money paid.<sup>b</sup> But the indorser of a bill is not in general entitled to recover from the acceptor the costs of an action brought against him by the indorsee, there being no privity between them independently of the bill.<sup>c</sup> And when the acceptor of an accommodation bill is obliged to pay costs as well as the principal sum, in order to recover the former he must declare specially,<sup>d</sup> unless he incurred the costs at the request of the drawer.<sup>e</sup>

Money paid on a bill or note for the use of one of the parties.

\*So where *A.* deposited with the defendant as a security for goods, a bill accepted by plaintiff, for which plaintiff received no value: *A.* afterwards paid for the goods, and asked for the restoration of the bill; but the defendant had indorsed it for value to *G.*, who recovered the amount from the plaintiff; held, that the plaintiff might recover the amount from the defendant, on a count for money paid.<sup>f</sup> A trustee under a will who pays the legacy duty upon an annuity, may recover the amount from the legatee, as money paid to his use.<sup>g</sup>

\*72

Where a husband went abroad and left his wife, who died in his absence, it was held, that her father having paid the expenses of her funeral, (suitable to the rank and fortune of her husband,) might recover such expenses from the husband as money paid for his use. "There are many cases of this sort," said Lord Loughborough, "where a person having paid money which another was under a legal obligation to pay, though without his knowledge or request, may maintain an action to recover back the money so paid; such as in the instance of goods being distrained by the commissioners of the land-tax—if a neighbor should redeem the goods and pay the tax for the owner, he might maintain an action for the money against the owner.<sup>h</sup> An executor who has paid the legacy duty may sue the legatee for the amount as money paid for his use at his request.<sup>i</sup>

Husband liable for expenses of wife's funeral.

<sup>a</sup> *Exall v. Partridge*, 8 T. R. 306.

<sup>b</sup> *Pownall v. Ferrand*, 6 B. & C. 439. (13 Eng. C. L. 230.)

<sup>c</sup> *Dawson v. Morgan*, 9 B. & C. 618. (17 Eng. C. L. 457.)

<sup>d</sup> *Seaver v. Seaver*, 6 C. & P. 673. (25 Eng. C. L. 591.)

<sup>e</sup> *Hewes v. Martin*, 1 Esp. 162. Where a person pays a bill for the honor of one of the parties to it, he may recover the amount from the person for whose use he paid it. *Smith v. Nissen*, 1 T. R. 269.

<sup>f</sup> *Bleaden v. Charles*, 7 Bing. 246. (20 Eng. C. L. 119.)

<sup>g</sup> *Hales v. Freeman*, 1 B. & B. 391. (5 Eng. C. L. 131.)

<sup>h</sup> *Jenkins v. Tucker*, 1 H. Bl. 90.

<sup>i</sup> *Foster v. Ley*, 2 Bing. N. C. 260. (29 Eng. C. L. 331.) 1 Hodges, 326.

(1) (The owner of property in the possession of a tenant of demised property, may buy it on a sale of the same as a distress for rent and bring his action for money paid against the tenant. *Wells v. Porter*, 7 Wend. 119.)

Payment  
by gua-  
rantee.

Where *A.* purchased goods on credit of *B.*, in the presence of *C.*, who said that he would pay for them if *A.* did not; held, that *C.* having subsequently paid for the goods voluntarily, might recover the amount from *A.* as money paid to his use; for though *C.* was not liable to pay, his guarantee not being in writing, yet as he had made the promise in the presence of *A.*, there was an implied agreement that if *C.* paid the money, *A.* should repay him, the payment should therefore be taken to have been made by the authority and at the request of *A.*<sup>a</sup>

\*73

\*So where the plaintiffs granted a lease of premises to the defendant, and procured their own attorney to draw the lease, for which they paid him; it was held that they might recover the sum so paid from the defendants, as money paid to their use; it appearing in evidence that it was the custom for the landlord's attorney to prepare the lease at the expense of the lessee.<sup>b</sup>

Carrier.

If a carrier by mistake deliver to *B.* goods consigned and sold to *C.*, and *B.* appropriate the goods to his own use, and the carrier on demand, even without action, pay *C.* their value, he may recover the amount from *B.* as money paid to his use.<sup>c</sup>

Wharfinger.

But where goods came to a wharfinger consigned to *A.*, and *B.* believing them to be meant for himself, carried them to the wharf and used them before he discovered the mistake; held, that the wharfinger after paying *A.* the value of the goods could not recover them from *B.* in an action for money paid to his use; the plaintiff should declare specially.<sup>d</sup>

Taxes  
paid by  
tenant for  
use of  
landlord.

Where by a local act it was provided, that a drainage tax should be paid by the tenants of the lands charged, who might deduct the same out of the rents payable to their landlords; it was held, that the tenants to be charged with the tax were those in whose time the tax accrued due, and not the tenants for the time being; and, therefore, where an outgoing tenant *having paid his rent in full*, was obliged to pay this tax, it was held, that he might recover it from the landlord in an action for money paid; for the landlord was ultimately liable, and if the tenant had previously paid it, he might have deducted it from the rent; it was, therefore, money paid by compulsion of law to the use of the landlord.<sup>e</sup>

\*74

But where the plaintiff demised to the defendant a house, under an agreement to pay a yearly rent, clear of all deductions for taxes and parochial rates; after occupying the premises for some time, the defendant quitted them, leaving claims for poor-rates and land-tax unpaid, which the plaintiff \*as landlord was obliged to pay; held, that he could not recover the amount from the defendant in an action for money paid; for the defendant's liability arose from the contract by which he

<sup>a</sup> *Alexander v. Vane*, 1 M. & W. 511.

<sup>b</sup> *Grissell v. Robinson*, 3 Bing. N. C. 10, *ante*, 44.

<sup>c</sup> *Brown v. Hodgson*, 4 Taunt, 189.

<sup>d</sup> *Sills v. Laing*, 4 Campb. 81.

<sup>e</sup> *Dawson v. Linton*, 5 B. & A. 521. (7 Eng. C. L. 179.)

was bound to pay the plaintiff only; and as the plaintiff paid the money to parties *who had no claim on the defendant*, it relieved the defendant from no liability, and consequently, it could not be said to be money paid to his use. The plaintiff's remedy was on the contract.<sup>a</sup>

3.—*Money paid by a surety.*] Where one is surety for another, and is compelled to pay the whole debt, he may recover it in an action for money paid, without any request or promise on the part of the principal, for the law *implies* a promise by the latter to indemnify the surety.<sup>b</sup>(1) In all cases where one of two joint sureties pays money which either of them may be called upon to pay, a special contract for the co-surety to repay him might be stated in an extended form, but in a compressed shape, the moiety is money paid to the use of the co-surety.<sup>c</sup> And bail may recover from the principal any expenses he may have reasonably incurred in taking him into custody for the purpose of surrendering him.<sup>d</sup> If several persons become sureties for another, either jointly or severally, on account of the same debt, and the obligor compels one of them to pay the whole debt, he may recover from each of his co-sureties his proportion of the debt, even though the insolvency of the principal be not proved.<sup>e</sup>(2) But if one of three co-sureties become insolvent, the person paying the debt, cannot recover in law from the other, more than his aliquot share, that is one third of the debt,<sup>f</sup> though in equity he may recover a moiety from him.<sup>g</sup>

Contribution  
among  
sureties.

The right to contribution does not extend to *costs* \*incurred by the surety in defending an action brought by the obligee.<sup>h</sup> If one of several joint contractors be compelled to pay a demand for which they are all liable, he may recover contribution from the others for money had, as where the plaintiff and defendant were two of a committee appointed at a vestry meeting for the purpose of prosecuting nuisances on the waste lands of the parish, which committee had appointed an attorney who prosecuted, and afterwards compelled the plaintiff to

\*75

Payment  
by one of  
several  
joint contractors.

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- <sup>a</sup> *Spencer v. Parry*, 1 H. & Woll. 179. 4 N. & M. 771. 3 Ad. & Ell. 331.  
<sup>b</sup> *Toussaint v. Martinant*, 2 T. R. 104, per Lord Kenyon, C. J. *Exall v. Partridge*, 8 T. R. 310.  
<sup>c</sup> Per Tyndal, C. J., in *Grissell v. Robinson*, 3 Bing. N. C. 16, *ante*, 73, 44.  
<sup>d</sup> *Fisher v. Fallows*, 5 Esp. 171.  
<sup>e</sup> *Cowell v. Edwards*, 2 B. & P. 268. *Deering v. The Earl of Winchelsea*, *id.* 270.  
<sup>f</sup> *Browne v. Lee*, 6 B. & C. 689. (13 Eng. C. L. 294.)  
<sup>g</sup> *Peter v. Rich*, 1 Cha. Ca. 34, *id.* 696.  
<sup>h</sup> *Knight v. Hughes*, M. & M. 247. (14 Eng. C. L. 393.)

(1) (*Williams v. Moore*, 9 Pick. 432. *Clark v. Foxcraft*, 7 Greenleaf. 348. A surety extinguishing a debt by payment of less than its amount, is only entitled to recover the amount actually paid. *Bonney v. Seeley*, 2 Wend. 481.)

(2) (See *Chandler v. Brainard*, 14 Pick. 285. *Smith v. Hicks*, 5 Wend. 48. *Agnew v. Bell*, 4 Watts, 31. A guarantor of a note given with sureties cannot be made to contribute. *Longley v. Griggs*, 10 Pick. 121. *Harris v. Warner*, 13 Wend. 400.)



pay him his bill of costs; held, that the plaintiff might maintain an action for money paid against the defendant for contribution towards the costs and damages.\*

Where one of two joint contractors, upon a breach of their agreement, agreed with the creditors to refer the amount of damages to arbitration, without the consent of the other; held, that the former having paid the sum awarded, might recover a moiety thereof from his co-contractor in an action for money paid.<sup>b</sup>(1)

No contri-  
bution  
among  
joint tort  
feasors.

\*76

4.—*Contribution.*] But in actions *ex delicto* against several for a tort, if one be compelled to pay the whole damages he cannot exact contributions from the others, for there can be no contribution among joint tortfeasors.\* But the rule that wrong doers cannot have redress or contribution against each other, is confined to cases where a person seeking redress must \*be presumed to have known that he was doing an unlawful act.<sup>d</sup> And if one of several partners in trade pays money on account of his co-partners, he cannot maintain an action against them for contribution, on the ground that he made such payment by compulsion of law.\*

Where a passenger by a coach recovered damages from one of two joint proprietors, for an injury which he sustained in consequence of the negligence of their servants; held, that such proprietor might recover contribution from his co-proprietor, if he was not present when the accident happened.<sup>f</sup>

5.—*Money paid through breach of duty.*] But if a party be compelled to pay money in consequence of his own neglect or breach of duty, he cannot recover it. As where an auctioneer undertook to put up an estate to auction, so as to avoid

\* Holmes v. Williamson, 6 M. & S. 158. Blackett v. Weir, 5 B. & C. 385. (11 Eng. C. L. 257.)

<sup>b</sup> Burnell v. Minot, 4 Moore, 340. (16 Eng. C. L. 375.)

<sup>c</sup> Merryweather v. Nixon, 8 T. R. 186. Fairbrother v. Ansley, 1 Campb. 343. Wilson v. Milner, 2 Campb. 452. Colborn v. Patmore, 1 C. M. & R. 72. "The case of Merryweather v. Nixon has been very much overstrained, even beyond the decision. The rule in that case is, that wrong doers shall not have contribution from one another; and the exception is, that a party may, with respect to innocent acts, give an indemnity to another, which shall be effectual; although the act, when it came to be questioned afterwards, would not be sustainable in law against third persons who complained of it. Therefore, if one party induce another to do an act which cannot be supported, but which he may do without any breach of *bona fides*, or any desire to break the law, an action on an indemnity, either express or implied, may be supported." Per Lord Denman, C. J., in Betts v. Gibbins, 4 Nev. & M. 77.

<sup>d</sup> Adamson v. Jarvis, 4 Bing. 66. (13 Eng. C. L. 343.) Shackell v. Rosier, 2 Bing. N. C. 634, (29 Eng. C. L. 438.) *ante*, 23—41.

<sup>e</sup> Sadler v. Nixon, 5 B. & Ad. 936. (27 Eng. C. L. 247.)

<sup>f</sup> Wooley v. Batte, 2 C. & P. 417. (12 Eng. C. L. 198.) See Pearson v. Skelton, 1 M. & W. 504, where it was held that a coach proprietor, under similar circumstances, could not recover contribution, because there was a *partnership* fund, out of which the expenses were first to be paid, and the residue divided amongst the proprietors.

(1) (*Owens v. Collinson*, 3 Gill & Johns. 26.)



incurring the duty if it was not sold, but through his negligence, so transacted the business that the duty attached, which he was obliged to pay; held, that he could not recover the money so paid from his employer.<sup>a</sup> So where an officer permitted a prisoner to go at large on his promise to pay the debt of the creditor; in consequence of which he was obliged to pay the creditor himself; held, that he could not recover the amount from the prisoner, as he was guilty of a breach of duty, out of which he could not derive a cause of action.<sup>b</sup>

6.—*Money paid in furtherance of an illegal object cannot in general be recovered.*] Where the plaintiff by the defendant's authority and in his name, laid illegal bets on horses, and the bets having been lost, the plaintiff paid them without the defendant's consent; held, that he could not recover the money so "paid." So where the parties had entered into an agreement to conduct an unlicensed theatre, which was prohibited by the statutes 10 Geo. II, c. 28, and 28 Geo. III, and the plaintiff advanced money at the instance of the defendant for the purpose of carrying their object into effect; held, that an action for money had could not be maintained.<sup>d</sup>

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It seems to be now settled, on broad and satisfactory principles, notwithstanding the doubts which once prevailed, that money advanced by one person to another, with a knowledge that it is to be applied in furtherance of an illegal purpose, cannot, after it has been so applied, be recovered; for if it be unlawful in one man to pay money, how can it be lawful in another to furnish him with the means of payment.<sup>e</sup>

SECTION X.

WORK AND LABOR.

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1.—*Special contracts.*] **WHENEVER** there is a special contract

<sup>a</sup> Capp v. Topham, 6 East, 392.

<sup>c</sup> Clayton v. Dilly, 4 Taunt. 165.

<sup>d</sup> De Begnis v. Armistead, 10 Bing. 107. (25 Eng. C. L. 47.) See also Aubert v. Maize, 3 B. & P. 371. Cannan v. Bryce, 3 B. & A. 179. (5 Eng. C. L. 255.) But see Alcinbrook v. Hall, 2 Wils. 309. Petrie v. Hannay, 3 T. R. 418, where it has been held that, if such payments be made with the consent of the defendant, he is liable to be sued for them. "But the propriety of these decisions has been questioned in several subsequent cases." Per Abbott, C. J., in Cannan v. Bryce, 3 B. & A. 183. (5 Eng. C. L. 257.)

<sup>e</sup> 2 Stark. Ev. 61. See Cannan v. Bryce, 3 B. & A. 179.

<sup>b</sup> Pitcher v. Bailey, 8 East, 171.

or agreement to perform any work, a general *indebitatus assumpsit* will lie, when the work is performed and completed.\*

If a man agrees to build for another a house to be paid for it, and afterwards builds the house, in this case he has two ways of declaring, either upon the original executory agreement, as to be performed, *in futuro*, or upon an *indebitatus assumpsit*, or \**quantum meruit*, when the house is actually built and the agreement executed.<sup>b</sup>

Deviation from special contract. If a man declare upon a special agreement, and likewise upon a *quantum meruit*, and at the trial prove a special agreement, but different from what is laid, he cannot recover on either count: not on the first, because of the variance, nor on the second, because there was a special agreement. But if he prove a special agreement and the work done, but not pursuant to such agreement, he shall recover on the *quantum meruit*; for otherwise he would not be able to recover at all.<sup>c</sup> But if the plaintiff deviates from the specification, he cannot recover on a *quantum meruit* if the defendant refuses to accept the subject matter of the contract.<sup>d</sup> Yet, if the defendant adopts the deviations,<sup>e</sup> or derives a benefit from the plaintiff's services, he must pay *pro tanto*.<sup>f</sup> Where there was an express contract that the plaintiff should repair a chandelier for 10*l.*, and after having repaired it *in part* only, he brought an action for work done, materials provided, &c.; held, that he could not recover any remuneration, as he had delivered it in an imperfect state; the contract was entire, and the plaintiff had not performed his part of it; he therefore could recover nothing.<sup>g</sup>(1)

Repairing ships. But where a shipwright was engaged and undertook to put a ship in thorough repair, and before this was completed, he required payment for the work already done, without which he refused to proceed; held, that though the work was incomplete, \*he might maintain an action for the work already done

\* B. N. P. 139.

<sup>b</sup> Per Denison, J., *Alcorn v. Westbrook*, 1 Wils. 117.

\* B. N. P. 139. *Cooke v. Munstone*, 1 N. R. 355. *Cousins v. Paddon*, 1 Gale, 305.

<sup>d</sup> *Ellis v. Hamlen*, 3 Taunt. 52.

\* *Burn v. Miller*, 4 Taunt. 745.

<sup>f</sup> *Farnsworth v. Garrard*, 1 Campb. 38. The following important rule on this subject has been laid down in a modern case:—"When a party engages to do certain work, on certain specified terms, and in a certain specified manner, but in fact does not perform the work so as to correspond with the specification, he is not of course entitled to recover the price agreed upon, nor can he recover according to the actual value of the work, as if there had been no special contract. What the plaintiff is entitled to recover is the price agreed upon in the specification, subject to a deduction, and the measure of that deduction is the sum which it would take to alter the work so as to make it correspond with the specification." Per Parke, J., *Thornton v. Place*, 1 M. & Rob. 219.

<sup>g</sup> *Sinclair v. Bowles*, 9 B. & C. 92. (17 Eng. C. L. 340.)

(1) (*Phelps v. Sheldon*, 13 Pick. 50. *Watchman v. Crook*, 5 Gill & Johns. 239. *Philbrook v. Belknap*, 6 Vermont, 383. *Sickle v. Pattison*, 14 Wend. 257. *Brinley v. Tibbets*, 7 Greenleaf, 70. *Hayden v. Madison*, *Ibid.* 76. *Shaw v. Lewistown Turnpike Co.*, 2 Penna. 454.)

for there was no specific contract to complete the repairs before he demanded payment, he merely undertook the work in the same way as shipwrights ordinarily do.<sup>a</sup> A herald who sues for making out a pedigree, is bound to give some general evidence of the truth of that pedigree.<sup>b</sup>

Though there be a specific contract, the plaintiff's claim may be reduced, by showing that the work or materials were of an inferior description;<sup>c</sup> but the defendant should (though he need not) give notice to the plaintiff of the intended defence, for otherwise he may have ground to complain of surprise, as he may only come prepared to prove the agreement for the specific sum.<sup>d</sup> But where the plaintiff declares on a *quantum meruit*, the defendant may, without notice, give evidence of the inferiority of the work or materials;<sup>e</sup> and may entitle himself to a verdict, by showing that it was wholly inadequate to answer the purpose for which it was undertaken to be performed.<sup>f</sup> Where a person contracts to build a house, furnishing both timber and labor, he is not entitled to recover for the materials on a count for goods sold and delivered; for the contract is entire to do several things, all of which should be stated in the declaration.<sup>g</sup> So a person cannot recover for materials on a count for work and labor.<sup>h</sup>

Where the work or materials are of an inferior description.

If a person manufacture a chattel out of his own materials, he cannot recover for it on a count for work and labor, but he may on a count for goods sold and delivered.<sup>i</sup>

\*If you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labor and your materials to any other person. Having bestowed his labor at your request on your materials, he may maintain an action against you for work and labor. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labor and materials to any other person. No right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for, and the employer has ac-

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Where a party works up his own materials.

<sup>a</sup> *Roberts v. Havelock*, 3 B. & Ad. 404. (23 Eng. C. L. 105.)

<sup>b</sup> *Townsend v. Neale*, 2 Campb. 196.

<sup>c</sup> *Cousins v. Paddon*, 1 Gale, 305.

<sup>d</sup> *Basten v. Butter*, 7 East, 479. Yet if a person stipulates to make an article of certain materials for a certain sum, he cannot charge more than that sum, though he use better materials than those agreed upon, provided they were used without authority; nor can he insist on the return of the article, on the refusal of the defendant to pay the advanced price, *Wilmot v. Smith*, 3 C. & P. 453. (14 Eng. C. L. 386.)

<sup>e</sup> *Id.* *Chapel v. Hickes*, 2 C. & M. 214.

<sup>f</sup> *Farnsworth v. Garrard*, 1 Campb. 38. "If there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence." Per Lord Ellenborough, *id.* See also *Duncan v. Blundell*, 3 Stark. 6. (14 Eng. C. L. 145.)

<sup>g</sup> *Cotterell v. Apsey*, 6 Taunt. 322. (1 Eng. C. L. 400.)

<sup>h</sup> *Heath v. Freeland*, 1 M. & W. 543.

<sup>i</sup> *Atkinson v. Bell*, 8 B. & C. 277. (15 Eng. C. L. 216.)

cepted it, the party employed may maintain an action for goods sold and delivered; or, if the employer refuses to accept, a special action on the case for such refusal. But he cannot maintain an action for work and labor, because the labor was bestowed on his own materials, and for himself, and not for the person who employed him.<sup>a</sup>

Special  
contract  
and new  
work.

2.—*Extra work.*] Where there is a special contract, and new work is performed, not applicable to the terms of such contract, the plaintiff is entitled to recover on the *indebitatus* count for the new work, although the time for completing the payments under the original agreement has not expired when the action is commenced.<sup>b</sup>(1) But if the special contract be so far abandoned that it is impossible to trace it, and say to which part of the work it shall be applied, the workman shall be permitted to charge for the whole work done, by measure and value as if no such contract had been made;(2) but if work applicable to the terms of the contract can be traced, the excess only shall be paid for according to the usual rate of charging.<sup>c</sup>

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Where there was a specific contract, and alterations subsequently made, upon which the plaintiff claimed to abandon the contract, and to recover a measure and value price for the work actually done, Lord Tenterden made the following observations, which will be found of great importance in expounding transactions of this kind. “A person intending to make alterations of this nature, generally consults the person whom he intends to employ, and ascertains from him the expense of the undertaking; and it will very frequently depend on his estimate whether he proceeds or not. It is, therefore, a great hardship upon him if he is to lose the protection of this estimate, unless he fully understands that such consequences will follow, and assents to them. In many cases he will be completely ignorant whether the particular alteration suggested will produce any increase of labor and expenditure; and I do not think that the mere fact of assenting to them, ought to deprive him of the protection of his contract. Sometimes, indeed, the nature of the alteration will be such that he cannot fail to be aware that they must increase the expense; and cannot, therefore, suppose that they are to be done for the contract price. But where the departures from the original scheme are not of that character, I think the jury would do wisely in considering that a party does not abandon the security of his contract, by consenting that such alterations shall be made, unless he is also

<sup>a</sup> Per Bayley, J., 8 B. & C. 283.

<sup>b</sup> Robson v. Godfrey, Holt, 236. (3 Eng. C. L. 85.) 1 Stark. 275. (2 Eng. C. L. 388.) Gibbs.

<sup>c</sup> Pepper v. Burland, Peake, 103, per Lord Kenyon.

(1) (*Dubois v. Del. and Hudson Canal Co.*, 4 Wend. 285. S. C. 12 Wend. 334.)

(2) (*Hollingshead v. Mactier*, 13 Wend. 276.)

informed at the time of the consent that the effect of the alteration will be to increase the expense of the work."<sup>a</sup>

Under a count for work and labor, a broker may recover **Broker.** compensation for his trouble in effecting sales in foreign stocks; for transactions in the foreign funds are not within the prohibition of the stock jobbing act, (7 Geo. II, c. 8.)<sup>b</sup>

3.—*The parties.*] A master may maintain assumpsit for **Who may** the work and labor of his apprentice, against a person who **bring this** harbors him after his desertion, for he may waive the tort and **action.** sue on the implied contract.<sup>c</sup> Where *A.* was employed to make a machine, and while the work was in progress, paid money on account; before the machine was completed he assigned it to *B.*: this circumstance was communicated to his employer, who said to *B.* go on with the work and I will see you paid; held, that after the machine had been completed and delivered, *B.* <sup>\*82</sup> might sue the employer for the price of such parts of it as had been made by him after the assignment; for the legal effect of the words, "go on and I will see you paid," was to make a contract with the plaintiff for all the work that remained to be done.<sup>d</sup> *A.* being employed by the defendant to transport **Delega-** goods to a foreign market, delegated the entire employment **tion of em-** to the plaintiff, who performed it without the privity of the **ployment.** defendant; held, that the plaintiff could not recover from the defendant a compensation for such service.<sup>e</sup> In assumpsit for work and labor, the defence was that *A.* was the person employed to do the work and not the plaintiff; held, that *A.* was a competent witness to prove this, although he was an uncertificated bankrupt, and his assignees had received the amount due for this work, as done by him.<sup>f</sup>

Where the defendant had contributed to the funds of a building society, and had been present at a meeting of the society, **Who is** and party to a resolution that certain houses should be built; **liable to** held, that this made him liable to an action for work done in **be sued.** building those houses, without proof that he had any actual interest in them, or in the land on which they were built.<sup>g</sup> So the subscribers who attend a committee for managing the concerns of an hospital, are liable to the creditors of the hospital.<sup>h</sup> A request to a tradesman to show the defendant's house, and that the defendant would make him a handsome present, is evidence of a contract to pay a reasonable compensation for the work and labor bestowed in that service.<sup>i</sup> But where a

<sup>a</sup> Per Lord Tenterden, C. J., in *Lovelock v. King*, 1 M. & Rob. 60.

<sup>b</sup> *Wells v. Porter*, 2 Bing. N. C. 722. (29 Eng. C. L. 469.) *Oakley v. Rigby*, *id.* 732. (29 Eng. C. L. 469.)

<sup>c</sup> *Foster v. Stewart*, 3 M. & S. 191.

<sup>d</sup> *Oldfield v. Lowe*, 9 B. & C. 73. (17 Eng. C. L. 333.)

<sup>e</sup> *Schmaling v. Thomlinson*, 6 Taunt. 147. (1 Eng. C. L. 336.)

<sup>f</sup> *Wilson v. Gallatly*, 2 C. & P. 467. (12 Eng. C. L. 219.)

<sup>g</sup> *Braithwaite v. Schoefield*, 9 B. & C. 402. (17 Eng. C. L. 404.)

<sup>h</sup> *Burl v. Smith*, 7 Bing. 705. (20 Eng. C. L. 298.) 5 M. & P. 735, S. C.

<sup>i</sup> *Jewry v. Busk*, 5 Taunt. 302. (1 Eng. C. L. 113.)

person had performed work for a committee under a resolution entered into by them, "that any service to be rendered by him should be taken into consideration, and such remuneration made as should be deemed right;" held, that an action would not lie to recover recompense for such work, as the resolution only imported that the committee were to judge whether any remuneration was due.<sup>a</sup>

\*83      \*If a man undertakes to perform services without any reward, but with a view to a legacy, he cannot, after the death of the person for whom they were performed, set up a demand for such services against the testator's estate.<sup>b</sup>(1) The registered owner of a ship is not liable for repairs, &c., done thereto, unless done on his credit. Legal ownership may be *prima facie* evidence of liability for necessary repairs; but such presumptive responsibility may be rebutted by proof of the beneficial interest having been parted with, and of the legal owner having ceased to interfere with the management of the ship; or by proof of other circumstances, showing that in fact no credit was given to, or contract made with the legal owner.<sup>c</sup>

Repairs of ships.

4.—*Compensation to professional men.*] The general rule is, that any man who bestows his labor for another, has a right of action to recover compensation for that labor. There are two exceptions to that rule, viz., physicians and barristers. The law supposes them to act with a view to an honorary reward. In other degrees, in those professions, parties may recover for their services.<sup>d</sup>

A barrister cannot sue for fees.      A counsel can maintain no action for his fees, which are given not as *locatio vel conductio*, but as *quiddam honorarium*, not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation.<sup>e</sup> Nor can an action be maintained against a barrister to recover a fee given to argue a cause which he did not attend.<sup>f</sup>

Nor can a physician.      A physician cannot maintain an action for his fees.<sup>g</sup> Where a medical practitioner passed himself off as a physician, the court held that he could not maintain an action for his fees, although he had no right to assume that character, not having

\*84      \*a diploma.<sup>h</sup> A physician cannot recover for medicines which

<sup>a</sup> Taylor v. Brewer, 1 M. & S. 290.

<sup>b</sup> Le Sage v. Coussmaker, 1 Esp. 187.

<sup>c</sup> Jennings v. Griffiths, 1 R. & M. 42. (21 Eng. C. L. 378.) 119. Harrington v. Fry, 2 Bing 179. (9 Eng. C. L. 370.) Chitty on Contracts, 2d ed. 453. See Abbott on Shipping, 5th ed. 17. Briggs v. Wilkinson, 7 B. & C. 30. (14 Eng. C. L. 10.)

<sup>d</sup> Per Curiam, Poucher v. Norman, 3 B. & C. 745. (10 Eng. C. L. 220.)

<sup>e</sup> 3 Bl. Com. 28.

<sup>f</sup> Turner v. Phillips, Peake, 122. Not for negligence, however gross, Fell v. Brown, *id.* 96. Nor for words spoken by him in the conduct of a cause, which were pertinent to the subject, Hodgson v. Scarlett, 1 B. & A. 232. Per Holroyd, J., Flint v. Pike, 4 B. & C. 481. (10 Eng. C. L. 382.)

<sup>g</sup> Chorley v. Bolcot, 4 T. R. 317.

<sup>h</sup> Lipscombe v. Holmes, 2 Campb. 441.

(1) (*Lee v. Lee*, 6 Gill & Johns. 316.)



he prepared and dispensed, even though furnished to his own patients.<sup>a</sup>

5.—*Surgeons.* | The statute 3 Hen. VIII, c. 11, s. 1, subjects any person who shall practise as a surgeon in the city of London, or seven miles round, without being licensed by the college of surgeons, to a penalty of 5*l.* a month.

In an action on a surgeon's bill where the defence was, that the plaintiff was not licensed pursuant to the foregoing statute; the court held that it was incumbent on the defendant to prove that fact.<sup>b</sup>

The province of a surgeon is confined to the reduction and cure of fractures and other injuries affecting the limbs, or such external ailments as may require the operation of the knife; it cannot be extended to internal complaints or local diseases.

Whatever medicine may be necessary for the purpose of removing a complaint which it is the duty of a surgeon to attend to and cure, he may, perhaps, be allowed to recover for; but he is not allowed to recover unless the medicine he administers be clearly auxiliary to his duty as a surgeon.<sup>c</sup> Therefore, where a surgeon attended a patient laboring under a *typhus fever*; held, that he could not recover for medicine furnished by him on that occasion, for it could not be considered a surgical case.<sup>d</sup> Where a surgeon in making out his bill left a blank for attendances, and the patient paid money into court on that count, the court held, that nothing further could be recovered.<sup>e</sup>

\*It is a good defence to an action on a surgeon's bill, that the defendant was rather injured than benefitted in his health in consequence of the gross unskilfulness or negligence of the plaintiff;<sup>f</sup> for the law implies an undertaking on the part of surgeons, that they will exert a reasonable degree of skill.<sup>g</sup> So, it seems, it will be a good defence, that the plaintiff was not licensed to practise as a surgeon;<sup>h</sup> or that he assumed the character of a physician though he had no diploma.<sup>i</sup> A surgeon is responsible for any injury done to a patient through want of proper skill in his apprenticeship; but such want of skill must be proved, it cannot be inferred.<sup>j</sup>

When entitled to recover for medicines.

\*85  
Negligence or unskilfulness.

<sup>a</sup> Per Best, C. J., *Allison v. Haydon*, 4 Bing. 619. (15 Eng. C. L. 90.)

<sup>b</sup> *Gremaire v. Le Clere Bois Valon*, 2 Campb. 144. But in an action by an apothecary, the plaintiff must prove his qualification, *Morgan v. Ruddock*, 1 H. & W. 505.

<sup>c</sup> Per Best, C. J., *Allison v. Haydon*, 4 Bing. 619.

<sup>d</sup> *Id.*

<sup>e</sup> *Tuson v. Batting*, 3 Esp. 192. A count for work and materials will cover a demand for attendances as a farrier, and for medicine administered, *Clark v. Mumford*, 3 Campb. 37. A person who professes to cure certain disorders within a specific time, and induces other persons to employ him by false and fraudulent professions of his skill, cannot recover for medicine and attendance, in the event of no benefit being derived, *Hupe v. Phelps*, 2 Stark. 480. (3 Eng. C. L. 440.)

<sup>f</sup> *Duncan v. Blundel*, 3 Stark. 6. (14 Eng. C. L. 145.)

<sup>g</sup> *Seare v. Prentice*, 8 East, 348.

<sup>h</sup> *Gremaire v. Le Clere*, 2 Campb. 144.

<sup>i</sup> *Lipcombe v. Holmes*, 2 Campb. 444. *Chorley v. Bolcot*, 4 T. R. 317.

<sup>j</sup> *Hancke v. Hooper*, 7 C. & P. 81.



6.—*Apothecaries.*] By the statute 55 Geo. III, c. 194, s. 20, explained by 6 Geo. IV, c. 133, no apothecary shall be allowed to recover any charges claimed by him in any court of law, unless such apothecary shall prove *on the trial*, that he was in practice as an apothecary prior to or on the first of August, 1815, or that he has obtained a certificate to practise as an apothecary from the society of apothecaries.<sup>a</sup> Practising as an apothecary, is the mixing up and preparing medicines prescribed by a physician, or by any other person, or by the apothecary himself. But acting as surgeon or accoucheur is not practising as an apothecary.<sup>b</sup>

In an action to recover the amount of an apothecary's bill, if the plaintiff proves a certificate, he need not also prove an apprenticeship served.<sup>c</sup> If a party did not keep any shop, or make up prescriptions of physicians before or on the first of August, 1815, he cannot be considered to have been in practice as an apothecary on that day.<sup>d</sup> In an action on a \*promissory note given to an apothecary for medicine and attendance; held, that the consideration appearing, it was incumbent on the plaintiff to show that he was qualified pursuant to the statute.<sup>e</sup> It has been decided that an *apothecary* may charge for attendance or medicine, but he cannot charge for both.<sup>f</sup> But in a subsequent case it was held, that a *surgeon* and *apothecary* may, besides his charge for medicine, recover such charges for attendance as the jury shall consider fair and reasonable.<sup>g</sup>

Proof of certificate. If the plaintiff relies on his *certificate*, it must be proved. By 6 Geo. IV, c. 133, s. 7, it is provided, that the common seal of the apothecaries' company is sufficient proof that the person named therein is qualified to practise. But the statute does not make the seal prove itself; the plaintiff therefore must prove that it is the seal of the company.<sup>h</sup> The plaintiff need not, however, prove his apprenticeship.<sup>i</sup>

7.—*Servants' Wages.*] It is clearly agreed, that if a person retain a servant, and agree to pay him so much by the day,

<sup>a</sup> The statute does not extend to physicians, or members of the college of surgeons, s. 29; but Scotch physicians are not privileged. *The Apothecaries' Co. v. Collins*, 4 B. & Ad. 604. (24 Eng. C. L. 123.) *Collins v. Carnegie*, 1 Ad. & Ell. 695. (28 Eng. C. L. 180.)

<sup>b</sup> *Woodward v. Ball*, 6 C. & P. 577. (25 Eng. C. L. 549.)

<sup>c</sup> *Sherwin v. Smith*, 1 Bing. 204. (8 Eng. C. L. 297.) See *Morgan v. Ruddock*, 1 H. & W. 505, *ante*, 84.

<sup>d</sup> *Thompson v. Lewis*, 3 C. & P. 483. (14 Eng. C. L. 401.)

<sup>e</sup> *Blogg v. Pinkers*, R. & M. 125. (21 Eng. C. L. 395.)

<sup>f</sup> Per Best, C. J., *Town v. Lady Grisley*, 3 C. & P. 581. (14 Eng. C. L. 462.)

<sup>g</sup> Per Lord Tenterden, C. J., *Handey v. Hewson*, 4 C. & P. 110. (19 Eng. C. L. 300.)

<sup>h</sup> *Chadwick v. Bunning*, R. & M. 307. (21 Eng. C. L. 447.) 2 C. & P. 106. (12 Eng. C. L. 49.)

<sup>i</sup> *Sherwin v. Smith*, 1 Bing. 204. (8 Eng. C. L. 297.) In an action for the penalty under the statute, for practising without being duly qualified, the defendant must prove that he was duly qualified. *Apothecaries' Co. v. Bentley*, R. & M. 159. (21 Eng. C. L. 404.)

month, or year, that the servant may have an action against the master on the contract, or against his executors; and that every such retainer will be presumed to be in consideration of wages, unless the contrary appear.<sup>a</sup>

A general hiring, without mention of time, is a hiring for a year; but in case of a *domestic* or *menial* servant there is a common understanding, that either party may determine the engagement upon giving a month's warning, and there is in such a case a tacit promise by the master to pay a month's wages if he dismiss his servant without notice; but there is no such practice with respect to servants in *husbandry*.<sup>b</sup>

\*In case, therefore, of a yearly hiring, express or implied, (with the exception of menial servants,) if the master turn away the servant before the expiration of the year, without a sufficient cause, he will be liable to pay his wages until the end of the year, even though the wages be payable monthly or otherwise.<sup>c</sup> But if the servant leaves his service before the expiration of the year, without any cause, it operates as a forfeiture of the wages due to him, and he cannot recover any thing, for there can be no apportionment of the wages under such circumstances.<sup>d</sup> So if the master discharges him for a justifiable cause before the end of the year, the servant will not be entitled to wages for any portion of the year; for, having violated his duty, so as to prevent the master from having the benefit of his service for the whole year, he cannot recover wages *pro rata*.<sup>e</sup> Whether the cause of dismissal be sufficient or not, is a question for the jury. But if a sufficient cause exists at the time, the master will be justified, though he discharges the servant through a different motive.<sup>f</sup> And it is immaterial in such a case that the master has recovered damages for the misconduct which induced him to turn the servant away.<sup>g</sup>

But if there be a dissolution of the contract by mutual consent, the servant is entitled to wages *pro rata*.<sup>h</sup> If there be

<sup>a</sup> Bac. Ab. Master & Servant. Pinchon's case, 9 Co. 88. Sands v. Leake, 2 Roll. R. 209.

<sup>b</sup> Per Curiam, in Beeston v. Collyer, 4 Bing. 309, (13 Eng. C. L. 444.) 12 Moore, 552. Huttman v. Boulnois, 2 C. & P. 511. (12 Eng. C. L. 239.) Robinson v. Hindman, 3 Esp. 235. Per Littledale, J., in Fawcett v. Cash, 5 B. & Ad. 908. (27 Eng. C. L. 233.) A *head gardener*, who resided in a distinct and separate house, but within the curtilage, is a menial servant, and liable to be discharged at a month's notice. Nowlan v. Ablett, 1 Gale, 72. 2 C. M. & R. 54. Crawford v. Reid, 1 Show, Parl. C. 124. So, a gamekeeper or bailiff, Anon. Moore, 8. Bertie v. Beaumont, 16 East, 33.

<sup>c</sup> Beeston v. Collyer, *supra*, 86. Fawcett v. Cash, 5 B. & Ad. 904. (27 Eng. C. L. 232.) 3 N. & M. 177.

<sup>d</sup> Huttman v. Boulnois, 2 C. & P. 510. (12 Eng. C. L. 239.)

<sup>e</sup> Turner v. Robinson, 5 B. & Ad. 789. (27 Eng. C. L. 190.) Spain v. Arnot, 2 Stark. 256. (3 Eng. C. L. 339.) Atkin v. Acton, 4 C. & P. 208. (19 Eng. C. L. 346.) Ridgway v. The Hungerford Market Co., 1 H. & W. 244. 4 N. & M. 797. 3 Add. Ell. 171.

<sup>f</sup> *Id.*

<sup>g</sup> Turner v. Robinson, *supra*. Brown v. Croft, 1 Ch. Gen. Pr. of the Law, 81.

<sup>h</sup> Thomas v. Williams, 1 Ad. & El. 685. (28 Eng. C. L. 180.) 3 N. & M. 545. Bankruptcy does not operate as a dissolution of such a contract, *id.*

\*87  
Leaving  
service be-  
fore the  
end of the  
year.

no specific contract express or implied, the servant is entitled to recover wages on a *quantum meruit*, for the time he served.<sup>a</sup>

\*89 It has been held, in a modern case, that a servant cannot \*under a common count for wages, recover for more than the time which he has actually served.<sup>b</sup> Yet it had been previously determined, that a servant improperly discharged in the middle of the quarter, might recover for the entire quarter under a general count for work and labor.<sup>c</sup> In *Ridgway v. The Hungerford Market Company*,<sup>d</sup> the court intimated a doubt whether it would not be necessary to declare specially to enable a servant to recover wages, when the contract was put an end to, before the year expired.

Where a servant, under a contract for a yearly hiring determinable by three months' notice, was dismissed in the middle of the quarter; held, that he could not maintain an action for the work and labor in respect of the *whole quarter's wages* before the end of the quarter. The court intimated an opinion that, in such form of action, he could only recover for the work actually performed, even after the expiration of the quarter.<sup>e</sup>

## SECTION XI.

### GOODS SOLD AND DELIVERED.

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1.—*When a count for goods sold, &c. may be obtained.*] In general, to enable the plaintiff to recover on a count for goods sold and delivered, it must appear that the goods were sold for

<sup>a</sup> *Bayley v. Rimmell*, 1 M. & W. 506.

<sup>b</sup> Per Lord Tenterden, C. J., in *Archard v. Horner*, 3 C. & P. 349. (14 Eng. C. L. 349.)

<sup>c</sup> *Gandall v. Pontigny*, 4 Campb. 375. 1 Stark. 198. (2 Eng. C. L. 154.) If the servant were under age, the master cannot deduct from, or set off against, the wages, advances or payments made by him to or for the servant, for articles not being necessities. *Hedgley v. Holt*, 4 C. & P. 104. (19 Eng. C. L. 297.) And though the master is not bound to provide medical attendance for his servant in case of illness, *Wennall v. Adney*, 3 B. & P. 247, yet, if he send for a medical practitioner for his servant, who is under his roof, he is obliged to pay him, and he cannot deduct the payment from the servant's wages, unless by special agreement. *Sellen v. Norman*, 4 C. & P. 80. (19 Eng. C. L. 284.)

<sup>d</sup> *Supra*.

<sup>e</sup> *Smith v. Hayward*, Q. B. M. T. 1837.

money, and that they have been actually or virtually delivered to the defendant.

If goods are to be paid for partly in money and partly in goods to be delivered, the vendor must declare specially; he cannot recover under the common count.<sup>a</sup> But if the goods be delivered to the plaintiff in part performance, he may recover the money under the common count: as where the plaintiff agreed to sell a horse to the defendant, to be paid for partly by a horse of the defendant's, and partly by money, and the horses were exchanged, but the defendant refused to pay the money; it was held, that the plaintiff might recover the money under a count for goods sold, &c.<sup>b</sup> \*89

If the time of credit has not expired, the plaintiff must declare specially; as where goods were to be paid for at the end of three months by a bill at two months, the credit will not elapse until the end of five months, and if at the end of three months the purchaser does not give a bill, the vendor's remedy is by a special action; for he cannot recover on the common count until the expiration of the five months.<sup>c</sup> Where goods were to be paid for by a bill at two months, and the vendee refused to give a bill; it was held that the vendor could not maintain an action for goods sold, until the expiration of two months.<sup>d</sup> So if goods are sold at six or nine months' credit, and they are not paid for at the end of six months, the vendee cannot be sued for them until the end of nine months.<sup>e</sup> So where the goods were sold at six months' credit, payment to be then made by a bill at two or three months, at the vendor's option, it is in effect a credit for nine months.<sup>f</sup> And even though the vendee be guilty of such fraud as would have entitled the vendor to recover in trover, the latter cannot maintain assumpsit until the time of credit has expired.<sup>g</sup> But where goods were sold at three months' credit, the vendee to give a bill at three months at the expiration of that period, if he wished for further time, a bill not having been given at the end of three months; it was held, that the vendor might immediately sue for goods sold and delivered.<sup>h</sup> \*90

When time of credit has not expired.

Where bills are given for goods and dishonored, the vendor may maintain an action for goods sold and delivered, provided bills given \*90

<sup>a</sup> *Harris v. Fowle*, cited 1 H. Bl. 287. *Talver v. West*, Holt, 179. (3 Eng. C. L. 66.)

<sup>b</sup> *Sheldon v. Cox*, 3 B. & C. 420. (10 Eng. C. L. 137.) See also *Forsyth v. Jervis*, 1 Stark. 437. (2 Eng. C. L. 461.) *Ingram v. Shirley*, *id.* 185. (2 Eng. C. L. 348.)

<sup>c</sup> *Mussen v. Price*, 4 East, 147. *Miller v. Shaw*, *id.* 149. And see *Dutton v. Solomon*, 3 B. & P. 582. *Brook v. White*, 1 N. R. 330.

<sup>d</sup> *Dutton v. Solomon*, 3 B. & P. 582. See *Hoskins v. Duperoy*, 9 East, 498.

<sup>e</sup> *Price v. Nixon*, 5 Taunt. 338. (1 Eng. C. L. 126.)

<sup>f</sup> *Helps v. Winterbottom*, 2 B. & Ad. 431. (22 Eng. C. L. 116.) *Strutt v. Smith*, 1 C. M. & R. 312. 4 Tyr. 1019.

<sup>g</sup> *Ferguson v. Carrington*, 9 B. & C. 59. (17 Eng. C. L. 330.) See *De Symmons v. Minchwick*, 1 Esp. 430. *Reid v. Hutchinson*, 3 Campb. 352.

<sup>h</sup> *Nickson v. Jepson*, 2 Stark. 227. (3 Eng. C. L. 327.)

for goods he be the holder of the bills, and in a condition to give them  
are disho- up; but he cannot recover if it appears that they are in the  
nored. hands of a third person.<sup>a</sup>

2.—*Delivery of the goods.*] In order to support this action the plaintiff must prove an actual or constructive delivery of the goods. Where the goods are of a moveable nature it is necessary to prove a delivery, or a tender, previous to the action, or the vendee must have been placed in a situation to take possession of them.<sup>b(1)</sup>

Goods re-  
maining  
in the cus-  
tody of the  
vendor.

Delivery  
to agent.

Where cigars were sold for ready money, and packed up in boxes of the purchaser, in his presence, which remained at his request, in the custody of the vendor; it was held, that an action for goods sold and delivered would not lie; the proper form of suing was for goods bargained and sold.<sup>c</sup> So where *A.* agreed to sell goods to *B.*, and an earnest was paid, and the goods were packed in cloths belonging to *B.*, but deposited on the premises of *A.* till *B.* should send for them, but *A.* declared that they should not be removed until he was paid; it was held not to be a delivery to *B.*<sup>d</sup> Where the vendee ordered goods to be delivered to his agent, it was held, that a written acknowledgement by the agent of the receipt of the goods was evidence of the delivery.<sup>e</sup> In general a delivery to a carrier, is a delivery to a vendee, where no particular mode of conveyance is pointed out.<sup>f</sup>

\*91  
Delivery  
of part.

\*Where there is an entire contract for the delivery of goods at different times, and part are delivered according to the contract, and the vendor makes default in delivering the remainder, he cannot before the expiration of the time maintain an action for the part delivered; for the vendee may, if the vendor fail to complete the contract, return the part delivered; but if he retain the part delivered, after the vendor has failed to complete the contract, the latter may recover the value of the goods which he has delivered;<sup>g</sup> or set off the value.<sup>h</sup>

### 3.—*When the plaintiff may waive a tort and sue for*

<sup>a</sup> *Hickling v. Hardey*, 7 Taunt. 312. (2 Eng. C. L. 118.) 1 Moore, 61. *Kearslake v. Morgan*, 5 T. R. 513. *Burden v. Halton*, 4 Bing. 455. (15 Eng. C. L. 37.) *Goodwin v. Coates*, 1 M. & Rob. 221. *Cundy v. Marriott*, 1 B. & Ad. 696. (20 Eng. C. L. 474.)

<sup>b</sup> Per Holroyd, J., in *Smith v. Chance*, 2 B. & A. 755.

<sup>c</sup> *Boulter v. Arnot*, 1 C. & M. 333.

<sup>d</sup> *Goodall v. Skelton*, 2 H. Bl. 316.

<sup>e</sup> *Biggs v. Lawrence*, 3 T. R. 454. *Sed quere.* See *Bauerman v. Radenius*, 7 T. R. 666.

<sup>f</sup> *Dawes v. Peck*, 8 T. R. 328. *Groning v. Mendham*, 5 M. & S. 189. See this subject more fully considered under the title *Carrier*.

<sup>g</sup> *Oxendale v. Wetherell*, 9 B. & C. 386. (17 Eng. C. L. 401.) See *Walker v. Dixon*, 2 Stark. 281. (3 Eng. C. L. 347.)

<sup>h</sup> *Shipton v. Casson*, 5 B. & C. 378. (11 Eng. C. L. 264.)

(1) (*Hart v. Tyler*, 15 Pick. 171. *Bement v. Smith*, 15 Wend. 493.)

(2) (*Brinley v. Tibbets*, 7 Greenleaf, 70.)

*goods sold and delivered.*] In many cases where the defendant has received goods wrongfully, a contract for the purchase will be inferred, and the plaintiff may waive the tort and recover the amount in an action for goods sold and delivered.<sup>a</sup> Where a father falsely and fraudulently represented that he was about to decline business in favor of his son, a minor, and thereby obtained possession of goods of which he disposed; he was held liable to the vendor as for goods sold to himself.<sup>b</sup> Where the vendor of cider-juice to be made on his premises, lent casks to the vendee for the purpose, which were seized through the vendee's default for a breach of the excise laws; it was held that the vendor might recover the price of the casks as for goods sold.<sup>c</sup> But where the plaintiff waives the tort and sues in assumpsit, it is incumbent on him to prove a clear title to the property.<sup>d</sup>

Where, by an agreement between an outgoing and an incoming tenant, the latter was to buy the hay, &c. of the former upon the farm, allowing the expenses of repairing the fences, &c.; and that the value of the hay and repairs should be ascertained by third persons; it was held, that the balance settled to be *\*due*, was recoverable upon the count for goods sold.<sup>e</sup> But where the plaintiff sold to the defendant beer in casks, giving him notice that unless he returned the casks in a fortnight, he would be considered the purchaser, and the defendant omitted to return them; it was held, that the defendant was not liable for them under a count for goods sold and delivered, as the whole rested in special agreement.<sup>f</sup> With reference to the last case, Lord Abinger, C. B., observed in *Bianchi v. Nash*, that it was only a *Nisi Prius* decision, and the facts certainly did not warrant the judgment.

Special agreement

\*92

The plaintiff agreed to let (or *lend*,) the defendant a musical snuff-box on the understanding that, if it were damaged, the defendant was to have it and pay for it, and 3*l.* 10*s.* was to be taken as its value. The defendant received the box accordingly, and it having been damaged while in his possession; it was held, that the plaintiff was entitled to maintain an action for goods sold and delivered to recover the 3*l.* 10*s.*; for this was a conditional sale, and when goods are sold on condition, and the condition is performed, the sale becomes absolute.<sup>g</sup>

Conditional sale

The price of goods delivered on sale or return may be recovered under the common count, if they be retained an unreasonable time;<sup>h</sup> or after the specified period.<sup>i</sup> The value of fix-

Sale or return.

<sup>a</sup> *Hill v. Perrott*, 3 Taunt. 274.

<sup>b</sup> *Biddle v. Levy*, 1 Stark. 20. (2 Eng. C. L. 277.)

<sup>c</sup> *Studdy v. Sanders*, 5 B. & C. 628. (12 Eng. C. L. 336.)

<sup>d</sup> *Per Abbott, C. J.*, in *Lee v. Shore*, 1 B. & C. 94. (8 Eng. C. L. 30.)

<sup>e</sup> *Leeds v. Burrows*, 12 East, 1.

<sup>f</sup> *Lyons v. Barnes*, 2 Stark. 39. (3 Eng. C. L. 234.)

<sup>g</sup> *Bianchi v. Nash*, 1 M. & W. 545.

<sup>h</sup> *Bayley v. Gouldsmith*, Peake, 56. *Coleman v. Gibson*, 1 M. & Rob. 168.

<sup>i</sup> *Harrison v. Allen*, 1 C. & P. 235.



Trees.

\*93

tures cannot be recovered under the common count.<sup>a</sup> But as the word effects includes fixtures, it should seem that *indebitatus assumpsit* for divers fixtures, effects, and goods and chattels, would entitle the plaintiff to recover the price of fixtures, and is a proper and comprehensive form.<sup>b</sup> The value of trees cannot be recovered under this count;<sup>c</sup> unless they be felled and carried away.<sup>d</sup> \*But the value of crops may.<sup>e</sup> Where there is an entire contract for work, labor, and *materials*, the latter cannot be recovered under the count for goods sold.<sup>f</sup>

Quantum  
valebant.Special  
contract.

4.—*Value of the goods.*] If there was no specific price agreed upon, the plaintiff will be entitled to recover for the value of the goods at the time of the delivery, on giving evidence thereof.<sup>g</sup> But if a delivery of the goods be proved, and there is no evidence respecting the value, the jury will be directed to presume that the articles were of the lowest price of goods of that description.<sup>h</sup> Where the plaintiff claims a *quantum valebant* only, and there is no price agreed upon, it is incumbent on him to prove the value, and it is competent to the defendant to show the inferiority of the goods, or even that they were of no value.<sup>i</sup> But where there has been a *special contract* as to the quality and price of the goods, if the goods delivered do not correspond with the contract, the vendee may repudiate the goods and return them; or he may give notice to the vendor to take them back, after he has given them a reasonable trial; and in such a case the vendor cannot recover on the contract; for he has failed to do that which was the consideration of the vendor's promise to pay, namely, to supply goods corresponding with the stipulation. But if the vendee retains the goods without giving such notice, it has been held that he will be liable to pay for them, pursuant to the contract, and that he will not be allowed to reduce the demand to a *quantum valebant*.<sup>j</sup>

Retaining  
goods of

Where the defendant, a soap-boiler, bought of the plaintiff a quantity of barilla, warranted to be of the best quality, and

<sup>a</sup> Lee v. Risdon, 7 Taunt. 188. (2 Eng. C. L. 69.)

<sup>b</sup> Hallen v. Runder, 1 C. M. & R. 266. 2 Ch. Pl. 43.

<sup>c</sup> Knowles v. Mitchell, 13 East, 249.

<sup>d</sup> Bragg v. Cole, 6 Moore, 114. (17 Eng. C. L. 19.) See Teale v. Anty, 2 B. & B. 99. (6 Eng. C. L. 32.)

<sup>e</sup> Parker v. Staniland, 11 East, 362. Mayfield v. Waddsley, 3 B. & C. 364. (10 Eng. C. L. 110.) Poulter v. Killingbeck, 1 B. & P. 397.

<sup>f</sup> Cotterell v. Apsey, 6 Taunt. 322. (1 Eng. C. L. 400.) 1 Marsh. 581.

<sup>g</sup> Bluett v. Osborne, 1 Stark. 384. (2 Eng. C. L. 437.)

<sup>h</sup> Clunness v. Pezzey, 1 Camp. 8.

<sup>i</sup> Basten v. Butter, 7 East, 483. Farnsworth v. Garrard, 1 Camp. 36. And see Cousins v. Paddon, 1 Gale, 305, *post*.

<sup>j</sup> See the observations of Lawrence, J., in Grimaldi v. White, 4 Esp. 95. Fisher v. Samuda, 1 Campb. 190. 2 Stark. Ev. 878. Groning v. Mendham, 1 Stark. 257. (2 Eng. C. L. 380.) Milner v. Tucker, 1 C. & P. 15. (11 Eng. C. L. 300.) Cash v. Giles, 3 C. & P. 407. (14 Eng. C. L. 372.) Hopkins v. Appleby, 1 Stark. 477. (2 Eng. C. L. 475.)



\*having used a part of it, he discovered that it was of an inferior quality; he continued, nevertheless, to use it, without making any complaint until the whole of it was consumed; in an action for the price, he paid into court as much as he considered it was really worth, and contended that as the goods were not of the quality contracted for, he was liable only on a *quantum valebant*; but Lord Ellenborough ruled, that as the defendant had not given notice to the plaintiff of any defect in the article, and had deprived him of the means of proving the value by the proper testimony, he could not set up the alleged defect as a defence.<sup>a</sup>

inferior quality without giving notice.

The doctrine, however, here laid down, has been disapproved of, and may be considered as overruled by subsequent cases. With reference to it, Parke, B., has said, "the want of notice could not there alter the legal right of the parties; Lord Ellenborough probably meant no more than that, after accepting and retaining the goods, such a defence would have no chance of success;"<sup>b</sup> and Bayley, B., said that "Lord Ellenborough did not lay that down as a rule, but only a guide for the conduct of the jury."<sup>c</sup>

The rule to be collected from the modern authorities, appears to be; that if the goods supplied do not correspond with the contract, and the vendee retain them, he may, without having given notice of their defect, set up their inferiority as a defence to an action on the contract; and thereby reduce the vendor's claim to a *quantum valebant*. And to entitle the plaintiff even to a *quantum valebant*, under such circumstances, he must show some new implied contract, arising from the defendant's conduct in respect of the goods, as by using them. "And," said Bayley, B.<sup>d</sup> "an abatement of the price is a convenient and intelligible rule, laid down in *Street v. Blay*,<sup>e</sup> not to put the defendant to a cross action."

Notice is not now necessary.

In an action for the price of pans, which were to be made of the best materials, at a stipulated price; Bayley, J., held, that if the defendants after giving them a reasonable trial, found them insufficient for the purpose for which they were intended, and gave notice to that effect to the plaintiff, he was bound to take them away, and they remained at his risk; but if no notice was given, but the defendants retained the pans, they were liable to pay *as much as the materials were worth*.<sup>f</sup>

\*95

But if the vendee retain the goods he is liable on a *quantum valebant*.

Where there was an agreement to plant a quantity of trees at a stipulated price on the defendant's grounds, and the plaintiff was to keep them in order, the court held that evidence of

<sup>a</sup> *Hopkins v. Appleby*, 1 Stark. 477. (2 Eng. C. L. 475.)

<sup>b</sup> In *Cousins v. Paddon*, 1 Gale, 306.

<sup>c</sup> In *Allen v. Cameron*, 1 C. & M. 840. <sup>d</sup> *Id.*

<sup>e</sup> 2 B. & Ad. 456, (22 Eng. C. L. 122,) *post.* *Cousins v. Paddon.* *Allen v. Cameron*, *supra.* *Poulton v. Lattimore*, 9 B. & C. 259. (17 Eng. C. L. 373.)

<sup>f</sup> *Okell v. Smith*, 1 Stark. 107, (2 Eng. C. L. 316,) recognised by Lord Tenterden in *Street v. Blay*, 2 B. & Ad. 463. (32 Eng. C. L. 125.)

non-performance of the contract by the plaintiff, by which the trees had become of less value to the defendant, was admissible to reduce the damages, in an action upon the agreement.<sup>a</sup>

Not liable unless a contract can be implied from his conduct in respect of the goods.

Where, in an action for the price of a machine sold and delivered, the defendant proved, that the machine was made under a special contract, with a stipulation, that if it did not work, nothing should be paid for it; and that when tried it could not be made to work at all, and was altogether useless; held, that the plaintiff was not entitled even to a *quantum valebant*, as he had not shown some new implied contract resulting from the defendant's conduct in dealing with the goods.<sup>b</sup>

Warranty and stipulated price

5. *Warranty.*] If there be a warranty and a stipulated price, the vendee may retain the goods, and prove the inferiority and the breach of warranty in mitigation of damages; "and there is no hardship in such a defence being allowed, as the plaintiff ought to be prepared to prove a compliance with his warranty, which is part of the consideration for the specific price agreed by the defendant to be paid."<sup>c</sup> Where seed was warranted to be good new growing seed; and soon after the sale the buyer was told that it did not correspond with the warranty, after which he sowed part and sold the residue; held, in answer to \*an action by the seller for the price of the seed, that the buyer might show that it did not correspond with the warranty, though he did not give to the seller notice of its defective quality. Littledale, J.: "Where goods are warranted, the vendee is entitled, although he do not return them to the vendor, or give notice of their defective quality, to bring an action for breach of the warranty, or if an action be brought against him by the vendor for the price, to prove the breach of the warranty in diminution of damages, or in answer to the action, if the goods be of no value. The not giving notice, indeed, raises a strong presumption that the articles at the time of the sale corresponded with the warranty, and calls for strict proof of breach of the warranty."<sup>d</sup>

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Principal and agent. Who should sue.

6.—*Of the parties to this action.*] In general, where an agent sells goods for his principal, the contract is in point of law between the principal and the buyer, and the former may maintain the action; but where the agent sells the goods as his own, concealing the name of his principal, and the principal

<sup>a</sup> Allen v. Cameron, 3 Tyr. 907. 1 C. & M. 832.

<sup>b</sup> Grounsell v. Lamb, 1 M. & W. 352.

<sup>c</sup> Per Lord Tenterden, C. J., in Street v. Blay, 2 B. & Ad. 462. (22 Eng. C. L. 124.)

<sup>d</sup> Poulton v. Lattimore, 9 B. & C. 259. (17 Eng. C. L. 373.) In this case, there being no evidence that the seed was of any value to the parties who sowed it, the defendant had a verdict. Fielder v. Starkin, 1 H. Bl. 17. Germaine v. Butler, 3 Stark. 32. (14 Eng. C. L. 152.) Patteshall v. Tranter, 1 H. & W. 178. 4 N. & M. 649.

brings an action against the buyer, the latter has a right to consider the agent as the principal, for all purposes, and may set off any claim which he had against the agent, or rely on any payment which he has made to him in due course, without notice that he was not the principal.<sup>a</sup> "If a person," said Lord Tenterden, "sells goods supposing at the time of the contract that he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal: on the other hand, if at the time of the sale the seller knows, not only that the person who is nominally dealing with him is not principal, but agent, and \*also knows who the principal really is, and notwithstanding all that knowledge, chooses to make the agent his debtor, then according to the cases of *Addison v. Gandasequi*,<sup>b</sup> and *Patterson v. Gandasequi*,<sup>c</sup> the seller cannot afterwards on the failure of the agent, turn round and charge the principal,<sup>d</sup> having once made his election, when he had the power of choosing between the one and the other."

\*97

An auctioneer may maintain this action in his own name Auction- against the purchaser of goods at an auction;<sup>e</sup> but he has no est. interest in the goods except that which he derives from his employers.<sup>f</sup> A master is not liable for goods ordered by his servant, without some proof of the authority given by the master.<sup>g</sup> If the master has on some occasions authorised his servant to take up goods on credit, he will be liable for goods subsequently supplied to the servant on credit, even though he, in the latter instance, furnished the servant with money to pay for them;<sup>h</sup> unless he had previously given notice to the vendee, that he would in future pay ready money.<sup>i</sup>

Liability of master for goods supplied to his servant.

It is, in general, a question of fact for the jury to decide who contracted, and to whom credit was given.<sup>j</sup> Where a tradesman makes out an account for goods in the name of a particular person, it must be taken that they were furnished on the credit of such person, unless it be shown by *unequivocal evidence* that the credit was in fact given to another.<sup>k</sup> Where

The party to whom credit was given is liable.

<sup>a</sup> *George v. Claggett*, 7 T. R. 359. *Rabone v. Williams*, *id.* 360. B. N. P. 130. 2 Stark. Ev. 874. Cowp. 255. 2 Campb. 24.

<sup>b</sup> 4 Taunt. 574. <sup>c</sup> 15 East, 62.

<sup>d</sup> Per Lord Tenterden, in *Thompson v. Davenport*, 9 B. & C. 86. (17 Eng. C. L. 337.) *Kymer v. Suwercroft*, 1 Campb. 109. *Speering v. Dyrane*, 2 Vern. 643.

<sup>e</sup> *Williams v. Millington*, 1 H. Bl. 81. *Coppin v. Walker*, 7 Taunt. 237. (2 Eng. C. L. 86.) *Coppin v. Craig*, *id.* 243. (2 Eng. C. L. 88.)

<sup>f</sup> *Dickenson v. Naul*, 4 B. & Ad. 638. (24 Eng. C. L. 130.)

<sup>g</sup> *Maunder v. Conyers*, 2 Stark. 281. (3 Eng. C. L. 347.) *Pearce v. Rogers*, 3 Esp. 214.

<sup>h</sup> *Rusby v. Scarlett*, 5 Esp. 76. *Showers*, 95. *Gilman v. Robinson*, R. & M. 226. (11 Eng. C. L. 508.) *Todd v. Robinson*, *id.* 217. (21 Eng. C. L. 421.)

<sup>i</sup> *Gratland v. Freeman*, 3 Esp. 85.

<sup>j</sup> 2 Stark. Ev. 875. *Leggatt v. Reid*, 1 C. & P. 16. (11 Eng. C. L. 301.)

<sup>k</sup> *Storr v. Scott*, 6 C. & P. 241. (25 Eng. C. L. 378.)

- goods are supplied for the use of the poor of the parish, upon orders signed by some of the overseers separately, all the persons acting as overseers are liable to be sued, including an assistant overseer, if the jury be of opinion that the goods were supplied on the credit of them all.<sup>a</sup> So if goods be supplied on
- \*98 \*the orders of an *acting* overseer, his co-overseer will be jointly liable, though he took no part in managing the parish affairs, if credit was given to him.<sup>b</sup>

## SECTION XII.

### ACCOUNT STATED.

What will sustain a count on an account stated.

AN acknowledgment by the defendant that a certain sum is due from him to the plaintiff, creates an implied promise to pay that sum; and will enable the plaintiff to recover it upon a count or an account stated.<sup>c</sup> Where the defendant said that he would call and settle the amount of an account sent in, it was held to be sufficient.<sup>d</sup> So where the defendant sent 5*l.* on account, and stated that he would pay the remainder next week.<sup>e</sup> It is not necessary that the defendant's admission should relate to more than one item or transaction, or that there should have been cross dealings or accounts between the parties; an acknowledgment of a debt, though consisting only of one item, is sufficient.<sup>f</sup> The rule is, that if a fixed and certain sum is admitted to be due to the plaintiff, for which an action would lie, it will be evidence to support a count upon an account stated.<sup>g</sup>

The acknowledgment must be to the plaintiff.

But the acknowledgment must be made to the plaintiff or his executor, for where the defendant said to a third person, that he owed a certain sum to the plaintiff, and that he was afraid he was going to put him to trouble, it was held insufficient to support an account stated.<sup>h</sup>

\*99  
It must

\*But it lies only when an account has been stated with reference to former transactions. Therefore, where the landlord

<sup>a</sup> Kirby v. Bannister, 5 B. & Ad. 1069. (27 Eng. C. L. 270.) 3 N. & M. 119.

<sup>b</sup> Eaden v. Titchmarsh, 1 Ad. & Ell. 691. (28 Eng. C. L. 181.)

<sup>c</sup> Trueman v. Hurst, 1 T. R. 42. Knox v. Whalley, 1 Esp. 159. Dawson v. Remnant, 6 Esp. 24.

<sup>d</sup> Clark v. Glennie, 3 Stark. 10. (14 Eng. C. L. 147.)

<sup>e</sup> Peacock v. Harris, 10 East, 104.

<sup>f</sup> 2 Saund. 122, n. Knowles v. Michel, 13 East, 249. Highmore v. Primrose, 5 M. & S. 65.

<sup>g</sup> *Per curiam*, in Porter v. Cooper, 1 C. M. & R. 387. 4 Tyr. 264, 5. In an action on an unstamped note, proved to have been given for goods sold, the defendant had admitted, without adverting to the note or goods, that he owed the plaintiff a specified sum; held sufficient to support an account stated. Ashby v. Ashby, 3 M. & P. 186.

<sup>h</sup> Breckon v. Smith, 1 Ad. & Ell. 488. (28 Eng. C. L. 125.)

of an insolvent tenant got possession of the premises, in which there were fixtures belonging to the latter, and agreed to give up possession to the assignees, on their paying 7*l.* rent due; the assignees, having taken possession of the fixtures, refused to pay the 7*l.*; the court held, that it could not be recovered from them upon an account stated, as the agreement was not bottomed upon any previous transaction between the parties.<sup>a</sup> So an acknowledgment by the defendant after action brought of money being due to the plaintiff, is not evidence of an account stated, there being no proof of any previous transactions between the parties.<sup>b</sup>

Where a partnership has been *dissolved*, and a final balance of the accounts has been struck between the partners, and there has been a promise to pay the balance, it may be recovered under this count.<sup>c</sup>

But to enable the plaintiff to recover upon this count, the acknowledgment of the defendant must be absolute. A mere qualified acknowledgment, as "I would pay you were it not for your own conduct," is not sufficient.<sup>d</sup> Where the plaintiff claimed 40*l.* upon an agreement by the defendant, as incoming tenant, to pay for growing crops, and the defendant *offered* 17*l.*; held, not evidence to support an account stated; for there was no settled or agreed balance, no acknowledgment of a debt, but a mere offer to purchase peace.<sup>e</sup>

Where a party examined before commissioners of bankrupt admitted that he had received a sum of money on account of the bankrupt after an act of bankruptcy, but not that it was a *\*subsisting debt*; held, that this was not evidence sufficient to support a count on an account stated with the assignees.<sup>f</sup> An admission obtained under a compulsory examination is not evidence of an account stated.<sup>g</sup> A banker's pass-book delivered to his customers, in which there are entries on one side only, is not evidence of a settled account between the parties, although the customer keeps the book without making any objection to the entries contained in it.<sup>h</sup> But an entry in a bankrupt's examination of a certain sum being due to *A.* is evidence of an account stated between them.<sup>i</sup>

To support this count, the plaintiff must prove an acknow- The pre-

<sup>a</sup> Clarke v. Webb, 4 Tyr. 673. 1 C. M. & R. 29.

<sup>b</sup> Allen v. Cook, 2 Dow. P. C. 546.

<sup>c</sup> Foster v. Allanson, 2 T. R. 479. See Clark v. Glennie, 3 Stark. 10. (14 Eng. C. L. 147.) Henley v. Sloper, 8 B. & C. 20. (15 Eng. C. L. 147.) 2 M. & R. 166.

<sup>d</sup> Evans v. Verity, R. & M. 239. (21 Eng. C. L. 427.) It is for the court to decide whether a consideration amounts to an account stated. Bishop v. Chambre, 3 C. & P. 55. (14 Eng. C. L. 207.)

<sup>e</sup> Wayman v. Hilliard, 7 Bing. 101. (20 Eng. C. L. 62.) 4 M. & P. 729. In an action on an account stated, the defendant cannot, under the plea of non-assumpsit, give in evidence an account subsequent to that declared upon, although it be in his favor. Fidget v. Penny, 1 C. M. & R. 403. 4 Tyr. 650.

<sup>f</sup> Tucker v. Barrow, 7. B. & C. 623. (14 Eng. C. L. 103.)

<sup>g</sup> Per Littledale, J., *id.*

<sup>h</sup> *Ex parte* Randleson, 2 Dea. & Chitt. 534.

<sup>i</sup> Eicke v. Nokes, 1 M. & Rob. 359.

oise sum  
due must  
be shown.

ledgment by the defendant expressly or by reference of some *precise sum* being due.<sup>a</sup> Where the plaintiff sued as executrix on an instrument void for want of a stamp, in the following form, "Received of *B.* (the testator) 100*l.*, which I promise to pay on demand with interest," the defendant, on being applied to by plaintiff for interest, stated, "that he would bring her some on the following Sunday;" held, that though this was an admission that something was due, still as it did not appear what the nature of the debt was, or that it was due to the plaintiff as executrix, or in her own right, or that it was one on which assumpsit would lie, the plaintiff was not entitled to recover, on an account stated, even nominal damages.<sup>b</sup> The offer of a cognovit is not an account stated;<sup>c</sup> but where accounts are submitted to an arbitrator (not by bond), his award may be given in evidence under this count.<sup>d</sup> Where *A.* agreed by parol to give *B.* 20*l.* to repair certain premises belonging to *A.*, if *B.* would take a lease of them; the lease having been \*executed, and *B.* having accordingly taken possession and repaired the premises, demanded the 20*l.* which *A.* promised to pay when the next quarter's rent became due; held, that *B.* was entitled to recover it, on an account stated, although it was objected that parol evidence as to the terms on which the lease was to be granted was inadmissible by the statute of frauds.<sup>e</sup> Where the defendant agreed verbally with the plaintiff to take a house, and purchase the fixtures at a valuation; the valuation having been made, the defendant took possession of the furniture and fixtures and paid part of the amount of the valuation; held, that he was liable for the remainder, on an account stated, and that he could not object to the plaintiff's defective title to the house.<sup>f</sup>

Attor-  
ney's bill.

An attorney's bill cannot be recovered on an account stated without proof of the delivery of his bill, although the amount has been admitted.<sup>g</sup>

Account-  
ing with  
the plain-  
tiff in a  
particular  
character.

Accounting with the plaintiff in a particular character, admits that character; having paid tolls to a party is evidence of his character of collector. The plaintiff may recover on an account stated by the defendant with the plaintiff's wife, but not on an account stated by the wife of the de-

<sup>a</sup> *Kiston v. Wood*, 1 M. & R. 253. *Teal v. Auty*, 2 B. & B. 99. (6 Eng. C. L. 32.) *Bernasconi v. Anderson*, M. & M. 183. (22 Eng. C. L. 285.) But see *Dickenson v. Hatfield*, 5 C. & P. 46. (24 Eng. C. L. 204.) *Dixon v. Deveridge*, 2 C. & P. 109. (12 Eng. C. L. 49.)

<sup>b</sup> *Green v. Davies*, 4 B. & C. 235, (10 Eng. C. L. 319,) 6 D. & R. 306. In this case the instrument was inadmissible in evidence for want of a stamp, and in another case a note payable on a contingency, and therefore void, was inadmissible. *Morgan v. Jones*, 1 C. & Jer. 162.

<sup>c</sup> *Spencer v. Parry*, 4 Nev. & M. 770. 3 Ad. & Ell. 331. 1 H. & W. 179.

<sup>d</sup> *Keen v. Batshore*, 1 Esp. 194.

<sup>e</sup> *Seago v. Deane*, 4 Bing. 459. (15 Eng. C. L. 39.) 1 M. & P. 227. 3 C. & P. 170. (14 Eng. C. L. 255.)

<sup>f</sup> *Salmon v. Watson*, 4 Moore, 73. (16 Eng. C. L. 363.)

<sup>g</sup> *Peacock v. Harris*, 10 East, 104. *Eicke v. Nokes*, 1 M. & Rob. 359.



defendant, unless she be proved to be his agent.<sup>a</sup> Where there were accounts between *A.* and *B.*, and *C.* became a partner with *B.*, and dealings continued between *B.* and *C.* as partners, and *A.*, who afterwards settled an account with *B.* and *C.*, wherein was included the money due from *A.* to *B.* alone; held, that the whole might be proved on an account stated, in an action by *B.* and *C.*<sup>b</sup>

Where the trustee of an estate, who had funds belonging to the *cestui que trust* in his hands, said that he was ready to pay him 10*l.* down if he would give him credit for certain repairs; held a sufficient acknowledgment to render him liable for that sum on an account stated.<sup>c</sup>

\*Where an account was stated between the defendant and his wife with the plaintiff, of an account due from the wife whilst sole to the plaintiff; it was held, that the action could not be maintained against the husband alone without the wife.<sup>d</sup> So the plaintiff cannot recover from the defendant upon an account stated, partly as administrator and partly in his own private capacity.<sup>e</sup> But the plaintiff may recover on an account stated with the defendant, including debts due from the defendant alone, and from the defendant and a deceased partner jointly.<sup>f</sup>

The statement of the account is the consideration for the promise; and therefore an action upon an account stated cannot be maintained against an infant; for since an infant cannot state an account the consideration fails.<sup>g</sup> An account alters the nature of the debt, and therefore, if a tenant being in arrear of rent settle an account with his landlord, and promise to pay him, *assumpsit* will lie.<sup>h</sup>

And it seems immaterial in what way the debt rose, if there be an account stated, and an express undertaking to pay the balance. This action lies, even though the items of account were secured by a specialty.<sup>i</sup> Where the parties having cross demands settle and balance their accounts, though part of the plaintiff's demand could not be recovered in an action, the settlement of the accounts shall bind the defendant, so that he shall not set up that defence in an action on the balance.<sup>j</sup>

<sup>a</sup> B. N. P. 129.

<sup>b</sup> Moore v. Hill, Peake Ev. 273. Gough v. Davies, 4 Price, 214. David v. Ellice, 5 B. & C. 196. (11 Eng. C. L. 201.)

<sup>c</sup> Roper v. Holland, 1 Har. & W. 167. 4 N. & M. 668. Case v. Roberts, Holt, 500. (3 Eng. C. L. 172.)

<sup>d</sup> Drue v. Thorne, Alleyne, 72. But it would be otherwise if the defendant had expressly promised to pay, per Buller, J., in Foster v. Allanson, 2 T. R. 483.

<sup>e</sup> Harrender v. Palmer, Hob. 88. 2 Stark. Ev. 76.

<sup>f</sup> Richards v. Heather, 1 B. & A. 29.

<sup>g</sup> Truman v. Hurst, 1 T. R. 40. Ingledew v. Douglas, 2 Stark. 36. (3 Eng. C. L. 233.)

<sup>h</sup> Ventr. 268. Roll. Ab. 9. 2 Stark. Ev. 75. 2 Keb. 813.

<sup>i</sup> Moravia v. Levy, 2 T. R. 483. 2 Stark. Ev. 75. Yet in Green v. Davies, 4 B. & C. 243, (10 Eng. C. L. 319,) Bayley, J., objects that it did not appear that the debt acknowledged was one for which *assumpsit* would lie.

<sup>j</sup> Dawson v. Remnant, 6 Esp. 24.



\*SECTION XIII.

THE DECLARATION.

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1.—*Venue.*] In assumpsit the venue is transitory and may be laid in any county.

When the action is brought in a court of inferior jurisdiction.

If the action be brought in an inferior court it must appear that every material fact took place within the jurisdiction of the court. It is therefore necessary to allege in the declaration, as well that the promise or contract was made, as that the consideration was received within the jurisdiction;<sup>a</sup> as in an action for money had and received, the declaration must allege that *the money was had and received*, and that the defendant had *promised* to pay within the jurisdiction.<sup>b</sup> Where the declaration alleged that the defendant was indebted to the plaintiff within the jurisdiction for the wages of, and due and owing to the plaintiff, within the jurisdiction, as the servant of the defendant, it was held sufficient.<sup>c</sup> An omission to allege that every material fact took place within the jurisdiction, will be error, even after verdict.<sup>d</sup> But as to such matters as are inserted only "*for aggravation of damages*," and might be omitted and yet the action remain, it is not necessary to lay them within the jurisdiction.<sup>e</sup>

The day.

2. *Time.*] As the day on which the contract was made, is alleged as matter of form only, it is not necessary that it should be correctly stated, it may be laid even after the commencement of the action.

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\*Assumpsit for money lent. The promise was laid in the declaration on the 27th of February; the writ issued on the 20th of February, and the declaration was filed on the 8th of March; after verdict for the plaintiff, a motion was made to arrest the judgment on the ground that on the face of the record the cause of action appeared to accrue after the issuing of the writ; but the court said, that the day was immaterial; in common assumpsit a day is alleged only for form, except

<sup>a</sup> 1 Saund. 74, a.

<sup>b</sup> Trevor v. Wall, 1 T. R. 151.

<sup>c</sup> Chitty v. Dendy, 3 Ad. & Ell. 319. 4 N. & M. 842. 1 H. & W. 169. It may be observed that in this case the declaration was in debt.

<sup>d</sup> 1 Saund. 74, a. Read v. Pope, 1 C. M. & R. 302. Salter v. Slade, 1 Ad. & Ell. 608. (28 Eng. C. L. 162.) 3 N. & M. 717.

<sup>e</sup> 1 Saund. 74, a.

on bills of exchange and promissory notes where the day was material, as it formed an essential part of the agreement;<sup>a</sup> and in general, the day on which a promise is laid to pay a bill of exchange is not material, unless it be expressly alleged to have been its date.<sup>b</sup>

3.—*Parties.*] The declaration should correctly set forth the names of all the parties to the contract; a misdescription in that respect will in general prove a fatal variance.<sup>c</sup>

Where a contract was entered into with two partners, and Partners. after the death of one of them, the survivor brought an action, without stating in the declaration that he sued as survivor, so that it appeared on the record as if the contract had been made with the plaintiff alone; held, that he was properly nonsuited.<sup>d</sup> So if one of two joint contractors sue, both being alive, that is a variance and a good defence on the general issue.<sup>e</sup> If a contract be entered into by one member of a firm for the benefit all, the action may be brought in the name of all the partners.<sup>f</sup> But where, in an action by *A.*, his wife, and *B.*, the declaration stated that the plaintiffs had agreed to let to the defendant certain lands, that the defendant became tenant to the plaintiffs and *C.*; but the agreement given in evidence purported to be \*made by an agent for the wife of *A.* and *B.* \*105 only, but *A.* had subsequently received rent from the tenant; held, a fatal variance, for it was not a joint agreement by the husband and wife to demise the land.<sup>g</sup>

If an agent makes a contract in his own name, the principal Principal may sue and be sued upon it; for it is a general rule, that when- and agent. ever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom, in point of law, it was made.<sup>h</sup> As where three parties agreed to be jointly interested in certain goods, but that they should be bought by one of them in his own name only, and he made a contract for the purchase accordingly; held, that all might join in suing the vendor for a breach of the contract.<sup>i</sup> Where an

<sup>a</sup> *Arnold v. Arnold*, 3 Bing. N. C. 81. *Cole v. Hawkins*, Stra. 21. *Mathews v. Spicer*, *id.* 806.

<sup>b</sup> *Hawkey v. Borwick*, 1 Y. & Jer. 376. See *Giles v. Bourne*, 6 M. & S. 73. 1 Ch. Pl. 259.

<sup>c</sup> *Graham v. Robertson*, 2 T. R. 282. It is necessary that all persons with whom a contract has been made, if living, should join in the action, and if any of them are dead, that fact should be stated. 2 Saund. 121, c.

<sup>d</sup> *Jell v. Douglas*, 4 B. & A. 374. (6 Eng. C. L. 451.)

<sup>e</sup> Per Abbott, C. J., *id.* So it is even since the new rules. *Neale v. M'Kenzie*, 2 C. M. & R. 67.

<sup>f</sup> *Garrett v. Handley*, 4 B. & C. 664. (10 Eng. C. L. 438.) See also *Alexander v. Barker*, 2 C. & J. 133.

<sup>g</sup> *Saunderson v. Griffiths* 2 B. & C. 909. (12 Eng. C. L. 404.) Where the plaintiff declared on the contract for the sale of goods, but mis-stated the party to whom the goods were to be delivered; held, a fatal variance, *Leery v. Goodson*, 4 T. R. 667.

<sup>h</sup> Per Curiam, *Cothay v. Fennell*, 10 B. & C. 671. (21 Eng. C. L. 146.)

<sup>i</sup> *Id.* 671. *Skinner v. Stocks*, 4 B. & A. 437. (6 Eng. C. L. 478). S. P. But

attorney carried on business under the firm of *A.* and Son; the son was not in fact a partner, but acted as clerk to his father; held, that *A.* might maintain an action in his own name for the amount of a bill for business done; for a party with whom a contract is actually made may sue without joining others with whom it is apparently made.<sup>a</sup> Where agents purchased goods in their own names, telling the vendor that there was an unnamed principal, who afterwards told the agents that he would renounce the contract; held, that the agents might maintain an action against the vendor for not delivering the goods, for the latter could not take advantage of the repudiation on the part of the principal.<sup>b</sup>

\*106 But the omission of a person who might have been joined \*as a defendant, can be taken advantage of only by a plea of abatement. As where an action was brought against the defendant as drawer of a bill of exchange, and the evidence was, that it was drawn by the defendant and another jointly; held no variance, the defendant should have pleaded that fact in abatement.<sup>c</sup> So where one of two joint contractors was dead, it was held that the survivor might be sued without any mention being made of the deceased party.<sup>d</sup> If, however, too many defendants be joined in an action it will prove fatal, for if the plaintiff fail in establishing a joint contract against them all, he will be non-suited.<sup>e</sup>

4.—*Statement of contract.*] A contract whether verbal or written should be correctly stated, either in the terms in which it has been made, or according to its legal effect; a material variance between the contract alleged and the contract proved will be a ground of nonsuit. The objection of variance, however, applies to those cases only where the declaration states one ground of action, and the party gives proof of another.<sup>(1)</sup>

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where one person purchased goods, and another was afterwards permitted to share in the adventure, the court held, that the vendor could not maintain an action against such other person for the price of the goods. *Young v. Hunter*, 4 Taunt. 582.

<sup>a</sup> *Kell v. Nainby*, 10 B. & C. 20. (21 Eng. C. L. 17.) But the father and son would be jointly liable for negligence, as they held themselves out as partners; per Lord Tenterden, *id.*

<sup>b</sup> *Short v. Spackman*, 2 B. & Ad. 962. (22 Eng. C. L. 223,) See *Sims v. Brittain*, 4 B. & Ad. 375, (24 Eng. C. L. 78,) *ante*, 52.

<sup>c</sup> *Evans v. Lewis*, 1 Saund. 291, *d.*; and if one of the joint makers be dead, it is no variance wholly to omit his name. *Mountstephen v. Brooke*, 1 B. & A. 224. 1 Saund. 291, *n. d.* 5th ed.

<sup>d</sup> *Richards v. Heather*, 1 B. & A. 29. The defendant cannot plead in abatement the non-joinder of a secret partner. If there be a dormant partner, not being an ostensible contracting party, the creditor may sue him jointly with the others if he chooses, but he is not bound to do so. *Mullett v. Hook*, 1 M. & M. 88. (22 Eng. C. L. 259.) *De Mantort v. Saunders*, 1 B. & Ad. 398. (20 Eng. C. L. 410.) In *ex parte Hamper*, 17 Ves. 403. *Ex parte Chuck*, 8 Bing. 471. (21 Eng. C. L. 346.)

<sup>e</sup> *Eliot v. Morgan*, 7 C. & P. 334. Coleridge.

<sup>f</sup> Per Holroyd, J., in *Parker v. Palmer*, 4 B. & A. 392. (6 Eng. C. L. 458.)

(1) (*Scott v. Lieber*, 2 Wend. 479. *Wardell v. Pinney*, 1 Wid. 217. *Crane v. Dygert*, 4 Wid. 675. *Guyon v. Lewis*, 7 Wid. 26. *Field v. Field*, 9 Wid. 395. *Church v. Feterow*, 2 Penna. 301. *Trask v. Duval*, 4 Wash. C. C. 97.)

Where the contract stated in the declaration was, that the defendant should take on board a full cargo of wheat, and the contract proved was, that he was to take 500 quarters of wheat; held a fatal variance; though that quantity in fact amounted to a full cargo.<sup>a</sup> So where the contract set forth was, that the defendant was tenant to the plaintiff, and that he promised to use lands in a husband-like manner; and the contract proved was, that the defendant was to farm the land in a husband-like manner, to be kept constantly in grass; held a fatal variance.<sup>b</sup> \*107

A contract to remove goods in a reasonable time is not supported by proof of a contract to remove them in a month.<sup>c</sup> A contract for wages upon a certain voyage from London to Africa, and thence to the West Indies, is not supported by proof of a contract for a voyage from London to Africa, and thence to the West Indies or America, and afterwards to London.<sup>d</sup> Where the contract declared upon was, to deliver good merchandisable wheat, and the proof was to deliver good second sort of wheat; held, a fatal variance.<sup>e</sup>

Where the contract alleged was to sell oats at so much *per bushel*, and the proof was to sell oats according to a *particular measure*; held, a variance; for a bushel without any other explanation, meant a bushel by the Winchester or statute measure.<sup>f</sup> A contract to be performed *on request* is not supported by evidence that it was to be performed on a particular day.<sup>g</sup>

An omission to state any exception or qualification in the contract will generally be a fatal variance. Thus, an averment that the defendant warranted a horse to be sound, is not supported by proof that the defendant warranted the horse to be sound, except a *kick on the leg*, for this is a qualified contract.<sup>h</sup> So where the declaration stated that the defendant had undertaken to carry and deliver goods safely, and the contract proved was to carry and deliver them safely, *fire and robbery excepted*.<sup>i</sup>

Where the contract alleged was that the defendant agreed to buy a large quantity of head-matter and sperm-oil in the possession of the plaintiff, which was afterwards ascertained to be a given quantity, and the contract proved was, for the purchase of all head-matter and sperm-oil *per the Wildman*; held, to be no variance, as the term in the contract not stated in the declaration did not qualify or annex any condition to that which was *\*stated*.<sup>j</sup> A contract to furnish goods, with a certain \*108

<sup>a</sup> Harrison v. Wilson, 2 Esp. 708.

<sup>b</sup> Saunderson v. Griffiths, 5 B. & C. 909. (12 Eng. C. L. 404.)

<sup>c</sup> Hore v. Milner, Peake, 42.

<sup>d</sup> Whyte v. Wilson, 2 Bos. & Pul. 116.

<sup>e</sup> Anon. Lord Raym. 735.

<sup>f</sup> Hoskin v. Cooke, 4 T. R. 314.

<sup>g</sup> Bordenave v. Bartlett, 5 East, 111. n.

<sup>h</sup> Jones v. Cowley, 4 B. & C. 446. (10 Eng. C. L. 377.) In Hemming v. Parry, 6 C. & P. 580, (25 Eng. C. L. 550,) Alderson, B., said that this case, although correctly decided, was a disgrace to the English law.

<sup>i</sup> Latham v. Rutley, 2 B. & C. 20. (9 Eng. C. L. 10.)

<sup>j</sup> Wildman v. Glossop, 1 B. & A. 9.

latitude as to price, as saddles at 24s. or 26s., may be described as a contract to furnish them at a reasonable price.<sup>a</sup> Where the contract declared upon was to deliver stock on the 27th of February, and the contract proved was to deliver stock on the settling-day, which was understood by the parties to be the 27th of February, it was held to be no variance.<sup>b</sup> A contract to deliver a quantity of gum-senegal will be supported by evidence of a contract for the delivery of *rough* gum-senegal, as all gum-senegal on its arrival in this country is called *rough*.<sup>c</sup> Upon an allegation of a loan of lawful money of Great Britain, the loan was proved to consist of a foreign coin, called pagodas; held, no variance.<sup>d</sup> A contract for the purchase of a certain quantity of goods, to wit, eight tons, is supported by proof of a contract for the purchase of *about* eight tons.<sup>e</sup> A contract to purchase of the plaintiff certain goods and merchandises, to wit, 328 half chests of oranges and lemons, for a certain price, to wit, the price of 623*l.* 13*s.*, is supported by evidence of a contract to buy 308 chests and 30 half chests of China oranges, and 20 chests of lemons, without specifying the price.<sup>f</sup>

In an action against the *acceptor* of a bill, signed *A.* and Co., it may be averred to have been drawn by certain persons using the style of *A.* and Co., though *A.* has no partner.<sup>g</sup> An averment that *A.* has received 500*l.* is not supported by evidence of the transfer of 500*l.* *stock* into his name.<sup>h</sup>

\*109 Where two lots are sold under an inclosure act, a declaration upon a sale of "divers, to wit, two lots," &c., is bad. The agreements are separate both in law and fact, and cannot be stated as one contract.<sup>i</sup> An allegation of a retainer at a certain salary, to wit, 250*l.* per annum, can be supported only by proof of contract for a certain specific salary.<sup>j</sup> Where a bill was stated in the declaration to have been indorsed *before* it became due, and the proof was that it was indorsed *after* it became due; held, no variance.<sup>k</sup> In an action by *A.* on a bill, which on the face of it was payable to *B.*, *A.* may prove that he was the intended payee.<sup>l</sup>

Where the declaration stated a contract to give a bill for 14*l.* 19*s.* and at the trial a written contract was produced to give a bill for 13*l.* 19*s.*; held, to be no variance, as it appeared

<sup>a</sup> Laing v. Fidgeon, 6 Taunt. 108. (1 Eng. C. L. 327.)

<sup>b</sup> Wickes v. Gordon, 2 B. & A. 335.

<sup>c</sup> Silver v. Heseltine, 1 Chitt. 39. (18 Eng. C. L. 23.)

<sup>d</sup> Harrington v. M'Morris, 5 Taunt. 228. (1 Eng. C. L. 88.)

<sup>e</sup> Gladstone v. Neale, 13 East, 410.

<sup>f</sup> Crispin v. Williamson, 8 Taunt. 107. (4 Eng. C. L. 36.)

<sup>g</sup> Bass v. Clive, 4 Camp. 78. 3 M. & S. 283. 4 id. 13.

<sup>h</sup> Jones v. Brindley, 3 Esp. 205.

<sup>i</sup> James v. Shore, 1 Stark. 428. (2 Eng. C. L. 456.) See Emmerson v. Heelis, 2 Taunt. 47, where, at a sale by auction, the same person was declared the highest bidder for two lots, and it was held that a distinct contract arose from each lot.

<sup>j</sup> Preston v. Butcher, 1 Stark. 3. (2 Eng. C. L. 268.)

<sup>k</sup> Young v. Wright, 1 Campb. 139.

<sup>l</sup> Willis v. Barrett, 2 Stark. 29. (3 Eng. C. L. 229.)

to be a mistake in drawing up the undertaking, and the contract, as the parties intended it, was correctly described in the declaration.<sup>a</sup>

In an action against a carrier, the *termini* are material; and a variance between the *termini* proved and those alleged, will be fatal, for they are of the essence of the contract.<sup>b</sup> Where the contract alleged was, that certain work was to be completed *within* 14 days before Michaelmas-day, and the averment proved was, that the work was to be completed 14 days *before Michaelmas*; held, a fatal variance, for the contract alleged was ambiguous, and different from that proved.<sup>c</sup>

But it is no variance if the declaration omit to state or allege a distinct and collateral matter contained in the contract, if the proof supports the declaration as far as it is requisite. For the plaintiff need only set forth that particular part of the contract, for the breach of which he sues.<sup>d</sup> As where, in an action by a sailor against the captain of a ship, the declaration stated a contract for the payment of a certain sum of money to the plaintiff, for *rum money*, and an agreement to this effect was proved, with an additional stipulation for a *pint of rum a day*; held, no variance, for the agreement proved corresponded with the declaration as far as the declaration went.<sup>e</sup> So a promise to deliver a horse which would be \*worth 80*l.*, and be a young horse, is supported by evidence of a promise to deliver a horse worth 80*l.*, and be a young horse; *and a warranty* that it had *never been in harness*; for if any substantive part of the warranty stated, not qualified by another part omitted, be proved not to be true, it is sufficient to maintain the action.<sup>f</sup> So a promise to deliver prime bacon, is supported by evidence of a promise to deliver prime *singed* bacon; for the plaintiff is only bound to state all that related to the point of which he complained, and beyond that he need not go.<sup>g</sup> Where the declaration alleged that the defendant bought of the plaintiff a certain quantity of rice, according to certain conditions, and it appeared in evidence that in addition to those conditions, the rice was sold per sample; held, no variance, not being an essential part of the description of the contract declared upon, but a mere collateral engagement or warranty, that the goods should answer the description of the parcel exhibited at the sale.<sup>h</sup>

Collateral  
matter  
need not  
be alleged

\*110

A contract in the alternative must not be stated as an absolute contract; as where the declaration alleged an agreement by the defendant to pay 20*l.*, if a given number should be

Contracts  
in the al-  
ternative.

<sup>a</sup> *Rose v. Sims*, 1 B. & Ad. 522. (20 Eng. C. L. 437.)

<sup>b</sup> *Tucker v. Cracklin*, 2 Stark. 385. (3 Eng. C. L. 394.) *White v. Wilson*, 2 B. & P. 116.

<sup>c</sup> *Thomas v. Lambert*, 1 H. & W. 224. 3 Ad. & Ell. 51.

<sup>d</sup> *Ward v. Smith*, 11 Price, 19.

<sup>e</sup> *Baptiste v. Cobbold*, 1 B. & P. 7.

<sup>f</sup> *Miles v. Sheward*, 8 East, 7.

<sup>g</sup> *Cotterill v. Cuff*, 4 Taunt. 285.

<sup>h</sup> *Parker v. Palmer*, 4 B. & A. 387. (6 Eng. C. L. 455.)



drawn on a given day, and the agreement proved was, to deliver an undrawn ticket *or* pay 20*l.*; held, a fatal variance.<sup>a</sup> So where it was agreed to purchase 100 bags of wheat, forty or fifty to be delivered on one market day, and the remainder on the next, and only forty were delivered; and in an action for the non-delivery of the remainder, the contract was not stated in the alternative; but one count stated an agreement to deliver forty bags, and another count to deliver fifty bags, in the first instance; held, a fatal variance.<sup>b</sup> If the contract alleged be executory, and that which is proved be executed, the variance is fatal.<sup>c</sup>

- \*111 \*5.—*Statement of the consideration.*] We have already seen that there must be a consideration to support the contract on which the action is founded.<sup>d</sup> Such consideration must be stated accurately in the declaration; for if any part of the entire consideration, or of a consideration consisting of several things be omitted, the plaintiff must be nonsuited; but if a contract consists of several distinct parts and collateral provisions, it is sufficient to state so much of the contract as contains the entire consideration, and the entire act to be done in virtue of such contract.<sup>e</sup> If it be stated that the defendant promised in consideration of one thing, and it appear that it was made in consideration of that thing and another; or if the promise be grounded on two considerations, and the plaintiff declares upon one only, he will be non-suited.<sup>f</sup>(1)

Variance  
in state-  
ment of  
the consi-  
deration.

In assumpsit on the warranty of a horse, the declaration stated the transaction as upon the sale of *one* horse, and the evidence was that *two* horses had been sold at an entire price, and with a joint warranty; held, a fatal variance, as the purchase of the two horses constituted the consideration for the warranty.<sup>g</sup>

In an action on the warranty of a horse, the consideration for the warranty was stated to be the sale of a horse to the plaintiff at 55*l.* The evidence was, that the plaintiff was to give that sum, but that the defendant had agreed to give one pound back if the horse did not bring the plaintiff 4*l.* or 5*l.*; held a fatal variance, as the declaration imported that the price was 55*l.* absolutely, whereas the evidence showed that the price

<sup>a</sup> Churchill v. Wilkins, 1 T. R. 448.

<sup>b</sup> Penny v. Porter, 2 East, 2; and see Tate v. Wellings, 8 T. R. 531. Dutton v. Solomon, 3 B. & P. 582. If a contract is in the alternative, and *one* branch of the alternative cannot by law be performed, the party is bound to perform the other, for it is absolute. Stevens v. Webb, 7 C. & P. 60.

<sup>c</sup> Com. Dig. Assumpsit, F. 6. <sup>d</sup> *Ante.*

<sup>e</sup> Per Lord Ellenborough, in Clark v. Gray, 6 East, 568. 1 Ch. Pl. 299. Miles v. Sheward, 8 East, 7. Leeds v. Burrows, 12 East, 1. Andrews v. Whitehead, 13 East, 102.

<sup>f</sup> King v. Robinson, Cro. Eliz. Timms v. Westcott, *id.* 147. 1 Lev. 300.

<sup>g</sup> Symonds v. Carr, 1 Campb. 361.

(1) (*Russell v. South Britain*, 9 Conn. 509. *Andrews v. Williams*, 11 Conn. 326.)



was subject to a contingent reduction.<sup>a</sup> Where the contract declared upon was that the defendant should deliver to the plaintiff all his tallow at 4s. per stone, and the evidence was that the defendant had agreed to deliver it at 4s. per stone, and so much \*more as the plaintiff paid to any other person; held a fatal variance.<sup>b</sup> So where land was alleged to be demised at a rent of 15l., and the proof was, that the rent was 15l. and three fowls; held, a fatal variance.<sup>c</sup> So if the declaration states several matters as a consideration, though all be not good, yet if a sufficient consideration remains, it is enough to support the promise alleged.<sup>d</sup> So if the allegation and the evidence be substantially the same it will be sufficient; as where the consideration was stated to be "a certain reasonable reward," it will not amount to a variance if it appears by the evidence that a specific sum was agreed upon.<sup>e</sup> \*112

If part of the consideration, or one of several considerations be frivolous or insufficient, that which is frivolous may be rejected as surplusage, and the promise will be referred to that part which is valid; the insufficient or frivolous part need not be alleged, or if alleged, need not be proved.<sup>f</sup> A sufficient consideration must appear on the face of the declaration.

In actions against persons whose characters and situations create certain liabilities, as against attorneys, bailees, &c., it is sufficient to allege that they were employed in those characters. Where the declaration alleged, that in consideration that the plaintiff would retain and employ the defendant to lay out a sum of money in the purchase of an annuity, the defendant undertook *to do his duty in the premises*, and that the plaintiff accordingly did retain the defendant, but that the defendant neglected to do his duty, and took an insufficient security; it was held, on motion in arrest of judgment, that the count was bad, since it did not show that any reward or remuneration was to be paid to the defendant, nor aver that the *defendant was employed as an attorney*, or in any particular character, by reason of which it became his absolute duty not to take a security of an insufficient \*nature.<sup>g</sup> But where the declaration stated that the plaintiff *retained* the defendant at his request to lay out 700l. in the purchase of an annuity, that the defendant promised to lay it out securely, that the plaintiff *delivered the money to him for that purpose*, and that the defendant laid it

<sup>a</sup> Blyth v. Bampton, 3 Bing. 472. (13 Eng. C. L. 57.) See also Vansandau v. Burt, 5 B. & A. 44. (7 Eng. C. L. 15.)

<sup>b</sup> Churchill v. Wilkins, 1 T. R. 447.

<sup>c</sup> Sands v. Ledger, 2 Ray. 792.

<sup>d</sup> King v. Sears, 2 C. M. & R. 48. 1 Gale, 241.

<sup>e</sup> Bayley v. Tucker, 2 N. R. 458.

<sup>f</sup> B. N. P. 147. Featherstone v. Hutchinson, Cro. Eliz. 149. Crisp v. Gamel, Cro. Jac. 126. Ring v. Roxbrough, 2 C. & J. 418. It is only necessary in case of executed considerations to state that the consideration for the defendant's promise moved at the defendant's request. King v. Sears, 2 C. M. & R. 48, *supra*.

<sup>g</sup> Dartnall v. Howard, 4 B. & C. 345. (10 Eng. C. L. 351.)

out insecurely; held, *after verdict*, that the consideration for the defendant's promise was sufficiently stated.<sup>a</sup>

Executed  
and execu-  
tory consi-  
derations.

6.—*Special averments.*] Where the consideration of the defendant's contract was *executed* or past at the time of making the contract, the declaration should proceed at once from the statement of the contract to the breach, without any intermediate averments. But when the consideration of the contract was *executory*, or his performance was to depend on some act to be done or forborne by the plaintiff, or on some other event, the plaintiff must aver the fulfilment of such condition precedent, whether it were in the affirmative or negative, or to be performed or observed by him or the defendant or some other person, or he must show some excuse for the non-performance.<sup>b</sup>

7.—*Conditions precedent.*] It is difficult to lay down any general rule as to what constitutes a condition precedent, so much depending upon the whole tenor of the contract, and the *intention* of the parties; for the precedency of the performance must depend on the order of time in which the intent of the transaction requires the performance.<sup>c</sup> (1)

When a  
day is ap-  
pointed for  
the per-  
formance  
of the de-  
fendant's  
act.

\*114

The following rules for discovering a condition precedent have been collected from the authorities.<sup>d</sup> If a day be appointed for payment of money or part of it, or for doing any other act, and this day is to happen or *may* happen *before* the thing which was the consideration of the defendant's contract was to be performed, an action may be brought for the money, or for not doing such other act before \*performance by the plaintiff; for it appears that the defendant relied upon the mere agreement to do the act and upon his remedy if not performed, and did not intend to make the plaintiff's performance a condition precedent. And so it is where *no time* is fixed for the performance of that which is the consideration of the money or other act; as where *A.* contracts to build a house for *B.* and finish it on or before a certain day, in consideration of a sum of money which *B.* contracts to pay *A.* by instalments as the building shall proceed; the finishing the house is not a condition precedent to the paying the money, but the contracts are independent, and *A.* may therefore sue *B.* for the whole sum, though the building be not finished at the time appointed.<sup>e</sup>

When the But when a day is appointed for the payment of money,

<sup>a</sup> Whitehead v. Greetham, 2 Bing. 464. (9 Eng. C. L. 483.) M'Clelland & Y. 205.

<sup>b</sup> Ughtred's Case, 7 Rep. 10. 1 Ch. Pl. 320. Com. Dig. Pl. C. 56.

<sup>c</sup> Per Lord Mansfield, C. J., in Kingston v. Preston, Doug. 690.

<sup>d</sup> 1 Saund. 320. 1 Ch. Pl. 323. See the authorities therein cited.

<sup>e</sup> Terry v. Duntze, 2 H. Bl. 389. See Martindale v. Fisher, 1 Wils. 88. Thorpe v. Thorpe, 1 Salk. 171, and other cases illustrative of this position in 1 Saund. 320.

(1) (*Dox v. Dey*, 3 Wend. 356. *McIntire v. Clark*, 7 Wend. 330.)

&c., and the day is to happen *after* the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money before the performance. Therefore where a ship was let to freight at a certain sum per month, to be paid on her final discharge at the end of her voyage, and she was lost in the middle of her voyage, it was held that no action could be maintained for freight.<sup>a</sup> So, where freight was to be paid on the ship's arrival at her first destined port, and she was lost before her arrival.<sup>b</sup>

plaintiff's  
act is to be  
done first.

Where a contract goes only to *part* of the consideration on both sides, and a breach of such contract on behalf of the plaintiff may be paid for in damages, and the defendant has actually received a *partial* benefit, an action may be supported against the defendant without averring performance by the plaintiff; for where a person has received a part of the consideration \*for his agreement, it would be unjust that, because he has not had the whole, he should therefore be permitted to enjoy that part, without either paying or doing any thing for it; and therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration. But in these cases it is necessary to aver in the declaration performance of at least part of that which the plaintiff contracted to do, or that the defendant has otherwise received a partial benefit.<sup>c</sup> Where the master and freighters of a vessel of 400 tons mutually agreed in writing, that the ship should with all convenient speed proceed to St. Petersburg, and there load from the freighter's factors a *complete* cargo of hemp and iron, and proceed therewith to London, and *deliver the same on being paid freight*, for hemp five pounds per ton, for iron five pounds a ton, &c.; held that the delivery of a *complete* cargo was not a condition precedent, but that the master might recover freight for a short cargo at the stipulated price per ton, the freighter having his remedy in damages for such short delivery; for the delivery of the cargo was in its nature divisible; and said Lord Ellenborough, "all the cases of condition precedent have been where the thing to be done was a strict indivisible condition."<sup>d</sup>

Where the  
contract  
goes to  
part of the  
considera-  
tion on  
both sides  
\*115

If the de-  
fendant  
has de-  
rived a  
partial be-  
nefit from  
the con-  
tract he is  
liable.

If a vendee receive one of several articles bought under one contract, he must pay for such article, though he might have refused to take it.<sup>e</sup> So where the defendant agreed to pur-

<sup>a</sup> *Byrne v. Pattinson*, Abbott, Ship. 347. *Smith v. Wilson*, 8 East, 437.

<sup>b</sup> *Gibbon v. Mendez*, 2 B. & A. 17. See other cases cited in 1 Saund. 320. But where a day is specified for the performance of certain works, and money is to be paid on the performance, although the works be not performed on the day specified, yet an action may be maintained for the money when they are performed, and the party paying the money may bring a cross action, for any damages occasioned by the delay. *Cock v. Curtoys*, 1 Saund. 320, b.

<sup>c</sup> 1 Saund. 320. c. d.

<sup>d</sup> *Ritchie v. Atkinson*, 10 East, 295. See *Cock v. Curtoys*, *ante*, 114. *Mitchell v. Darthez*, 1 Hodges, 418. 2 Bing. N. C. 555. (39 Eng. C. L. 419.)

<sup>e</sup> *Champion v. Short*, 1 Campb. 53.

chase a lot of trees at a certain sum, and pay for the same according to the conditions of the sale, and afterwards felled and carried away part of them without making such payment, and refused to pay until the remainder had been delivered; it was held that he was liable for the value of the trees which he had taken.<sup>a</sup> Upon a contract for twenty-four numbers of a periodical work to be delivered monthly at a guinea a number, the plaintiff may <sup>\*116</sup> sue for the numbers actually delivered, although not amounting to twenty-four.<sup>b</sup>

Where the contract is indivisible, a party cannot recover for a partial performance.

But if a party undertake to complete a certain act (*entire* and *indivisible*) before his claim to remuneration is to accrue, he cannot recover for a partial performance, although the completion was prevented by accident; as where a sailor was to be paid certain wages if he proceeded on a certain voyage, but *no part of the wages was to be paid* until his arrival at the port of discharge; the ship having been lost by a storm; before she had arrived at the port of discharge; it was held, that the sailor was not entitled to wages *pro rata* though the ship had earned freight.<sup>c</sup>

So where a printer contracted to print 750 copies of a work, and not to be he paid until the whole was delivered; after the delivery of 210 copies, and before the remainder was printed off, a fire broke out and consumed them; held, that he was not entitled to recover *pro rata* for the copies delivered.<sup>d</sup>

Where in an agreement between landlord and tenant it was stipulated that the tenant should spend 200*l.* in certain repairs, to be inspected and approved of by the lessor, and to be done in a substantial manner; and that the tenant should be allowed that sum towards *such* repairs, and should be at liberty to retain the same out of the first year's rent; held, that the approval of the landlord was not a condition precedent to the tenant's right to retain the sum so expended out of the rent; for the word *such* included only the quality of the repairs, "not the right of the landlord to decide on their sufficiency by his approval."<sup>e</sup>

8.—*Concurrent acts.*] Where two concurrent acts are to be done, the party who sues the other for non-performance must aver that he had performed or was ready to perform his part of the contract, or allege some excuse for the non performance.<sup>f</sup> (1) Where *A.* agreed to sell *B.* his estate for a

<sup>a</sup> Bragg v. Cole, 6 Moore, 114. (17 Eng. C. L. 19.)

<sup>b</sup> Mavor v. Pyne, 3 Bing. 286. (11 Eng. C. L. 104.)

<sup>c</sup> Appleby v. Dods, 8 East, 300. Cutter v. Powell, 6 T. R. 320. Hulle v. Heightman, 2 East, 145. Ch. on Cont. 369.

<sup>d</sup> Adlard v. Booth, 7 C. & P. 108. "It is laid down in Roll. Ab. that if a man makes a positive contract, the act of God shall not excuse his non-performance of it." Per Parke, B., in Liboni v. Kirkman, 1 M. & W. 422.

<sup>e</sup> Dallman v. King, 4 Bing. N. C. 105.

<sup>f</sup> Per Lord Kenyon, Morton v. Lamb, 7 T. R. 129.

(1) (See Howland v. Leach, 11 Pick. 151. Kane v. Hood, 13 Pick. 281. Tinney v. Ashley, 15 Pick. 546. Finley v. Boehme, 3 Gill & Johns. 42.)

certain sum before a particular day, in consideration whereof *B.* agreed to pay that sum on the day, and on failure to pay 21 $\frac{1}{2}$ .; held, that they were dependent covenants, and that *A.* could not recover the 21 $\frac{1}{2}$ . without showing a conveyance on his part or a tender of one.<sup>a</sup> (1) In declaring on a promise to pay money in consideration of forbearance by the plaintiff, the declaration must aver such forbearance.<sup>b</sup> So on a promise to pay a sum of money in consideration \*that the plaintiff would execute a release, there must be an averment that such release, was executed, or tendered and refused.<sup>c</sup> In an action for not delivering goods sold, the plaintiff should aver a readiness on his part to pay the price.<sup>d</sup> \*117

A tender or offer to perform, which the defendant rejected, is in law as good as an actual performance of a condition precedent: so is a readiness to perform, if the party discharged the other from performing, or prevented the execution of the matter to be performed. Where the defendant purchased a leasehold estate of the plaintiff at a public auction subject to the conditions, "that the purchaser should immediately pay down a deposit in part of the purchase-money, and sign an agreement for the payment of the remainder within twenty-eight days from the day of the sale, when possession should be given of the part in hand; and that the purchaser should have proper conveyances and assignments of the leases, without requiring the lessor's title, on payment of the remainder of the purchase-money." In an action against the purchaser for non-payment, pursuant to the conditions, and after verdict for the plaintiff, a motion was made in arrest of judgment, on the ground that the plaintiff had not set out his title, or tendered the conveyances to the defendant; the court held, that the plaintiff was not bound to set out his title; and that the allegations, that he was ready and willing and actually offered to convey were equivalent to a performance of the conditions on his part.<sup>e</sup> So in an action for not delivering bonds and other securities pursuant to an agreement, where the consideration money was to be paid on the receipt of the securities; held, it was not necessary to aver an actual tender of the money, an allegation of the plaintiff's readiness to perform was sufficient.<sup>f</sup> To satisfy an averment that the plaintiff was ready and willing to transfer, and requested the defendant to accept stock, which he refused, the plaintiff must prove an actual tender and refusal, or that he waited at the bank on the day appointed for the transfer until the close of the transfer books.<sup>g</sup> So where the defendant

A tender of performance if rejected is sufficient.

Tender of conveyance.

Transfer of stock.

<sup>a</sup> *Goodisson v. Nunn*, 4 T. R. 761.

<sup>b</sup> *Com. Dig. Pl. C. 52.*

<sup>c</sup> *Collins v. Gibbs*, 2 Burr. 899.

<sup>d</sup> *Rawson v. Johnson*, 1 East, 203.

<sup>e</sup> *Ferry v. Williams*, 8 Taunt. 62. (4 Eng. C. L. 18.)

<sup>f</sup> *Levy v. Herbert*, 1 Moore, 56. 7 Taunt. 314. (2 Eng. C. L. 119.)

<sup>g</sup> *Bordenave v. Gregory*, 5 East, 107.

(1) (When a vendor tenders a deed, which the vendee does not think according to the contract of sale, he should prepare a deed in conformity to the contract, and present it to the vendor in order to put him in default. *Hackett v. Huson*, 3 Wend. 249.)



agreed \*to pay for a copyhold estate upon receiving a good title and a proper surrender; in an action for the money it will not be sufficient to aver an offer to make a good title; the plaintiff must show that he furnished an abstract of a good title to the defendant, and offered to surrender, &c., but that the defendant refused.<sup>a</sup>

Where by one and the same instrument a sum of money is agreed to be paid by one party, and a conveyance of an estate to be at the same time executed by the other, the payment of the money and the execution of the conveyance may very properly be considered concurrent acts, and in that case no action can be maintained by the vendor to recover the money until he executes or offers to execute a conveyance.<sup>b</sup>

Excuse  
for non-  
perform-  
ance.

Where a party by his *own contract* engages to do an act, his performance of it is not excused by any inevitable accident or other contingency, although not foreseen by him or within his control; for it is his own fault and folly that he did not expressly provide against contingencies and exempt himself from responsibility on certain events.<sup>c</sup> It is a sufficient excuse for the non-performance, that the plaintiff was prevented through the conduct of the defendant,<sup>d</sup> or that the performance was rendered impossible by the act of God,<sup>e</sup> or an act of parliament will sometimes excuse the performance of a contract.<sup>f</sup> The performance of a condition precedent is not excused by reason of such performance being prevented by a mere stranger;<sup>g</sup> but if the defendant has disabled himself from performing his contract, the plaintiff need not aver the performance of a condition precedent.<sup>h</sup>

When the  
defendant  
has dis-  
abled him-  
self.

\*119  
Perform-  
ance pre-  
vented by  
defendant.

Where a vendor has, by selling his estate, incapacitated himself \*from executing a conveyance to the first purchaser, that renders further expense and trouble on the part of the latter unnecessary; and he may accordingly sustain an action without tendering a conveyance or the purchase-money.<sup>i</sup> Where an agreement for a demise provides that the lease shall be prepared, if required by either of the parties, at the sole expense of the lessor, the other party may bring an action for a refusal to execute it without tendering a lease; for as the lease is to be prepared at the expense of the lessor, and there is no context

<sup>a</sup> Phillips v. Fielding, 2 H. Bl. 123.

<sup>b</sup> Per Lord Tenterden, C. J., in Spiller v. Westlake, 2 B. & Ad. 157. (22 Eng. C. L. 50.)

<sup>c</sup> Paradine v. Jane, Alleyne, 27; recognised by Lord Ellenborough in Atkinson v. Ritchie, 10 East, 533, and in several other cases there cited.—See also Ch. on Contr. 568. Hadley v. Clark, 8 T. R. 267. See this rule more fully considered under the title *Covenants*.

<sup>d</sup> Pringle v. Taylor, 2 Taunt. 150.

<sup>e</sup> See various instances under the title *Carrier*.

<sup>f</sup> See Barker v. Hodgson, 3 M. & S. 270.

<sup>g</sup> Worsley v. Wood, 6 T. R. 710, *ante*.

<sup>h</sup> Knight v. Crockford, 1 Esp. 192.

<sup>i</sup> Sugden's Vendor and Purchaser, 9th ed. 248. Knight v. Crockford, *supra*. Duke of St. Albans v. Shore, 1 H. Bl. 271. 1 Gale, 362, *n*.

to explain it, it must be intended that the lessor is to prepare it also.<sup>a</sup>

Where there are mutual promises, and the mere promise and not the performance, is the consideration for the agreement, there an action may be maintained by either party without averring performance of the agreement on his part.<sup>b</sup> Where a declaration stating an agreement between two persons omitted the mutual promises, on motion in arrest of judgment it was held that the agreement imported a promise.<sup>c</sup>

Having thus illustrated the nature of conditions precedent, it remains to be observed, that whenever it can be collected from the apparent intention of the parties to the contract, that the consideration was a condition precedent; an averment of the performance, or of an excuse for the non-performance of the consideration must be alleged in the declaration, or the omission will be fatal on demurrer, or on motion in arrest of judgment, after judgment by default,<sup>d</sup> or even after verdict; as where a fire policy required that the minister and churchwardens should certify as to the plaintiff's character, the loss, &c.; it was held to be a condition precedent, and that the omission of an averment that such certificate was obtained, was fatal on a motion in arrest of judgment after verdict, although the jury found that the minister had wrongfully refused to sign the certificate.<sup>e</sup> But \*after verdict the omission may in some cases be aided by common law intendment, that every thing may be presumed to have been proved which was necessary to sustain the action. Thus in an action upon an agreement to sell or assign leasehold property, an averment by the plaintiff that he was ready, willing, and offered to assign, seems to be sufficient *after verdict*, without alleging that he had a good title.<sup>f</sup>

Where an averment of performance is necessary, it must be shown to be according to the *intent* of the contract, for it is not sufficient to pursue the words if the intent be not also performed, as on a promise in consideration that the plaintiff would cause *A.* to come to be bound to the defendant for 20*l.*, it is not sufficient to aver that the plaintiff caused *A.* to come to be bound, but it also ought to be alleged that *A.* was bound.<sup>g</sup> And the performance must be precisely alleged, and with reasonable certainty, that the court may judge whether the intent of the contract has been duly performed; as on a contract in consideration that the plaintiff would acquit *A.* of a debt, it is not sufficient to say that he acquitted him, without showing how, viz: by deed.<sup>h</sup> But, in general, it is sufficient to state a

Mutual promises.

Omission of averment of performance.

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Form of averment of performance.

<sup>a</sup> Price v. Williams, 1 Gale, 362. 1 M. & W. 6.

<sup>b</sup> Martindale v. Fisher, 1 Wils. 88.

<sup>c</sup> Mountford v. Horton, 2 N. R. 62.

<sup>d</sup> Collins v. Gibbs, 2 Burr. 899.

<sup>e</sup> Worsley v. Wood, 6 T. R. 710. Morton v. Lamb, 7 T. R. 125. 2 Saund. 352.

<sup>f</sup> Ferry v. Williams, 8 Taunt. 62, (4 Eng. C. L. 18,) ante, 117. 1 Ch. Pl. 327. See also Lee v. Edwards, 1 Vent. 44. 1 Lev. 280. Burgess v. Brazier, 1 Stra. 594.

<sup>g</sup> Com. Dig. Pl. C. 58.

<sup>h</sup> Lenerit v. Rivet, Cro. Jac. 503. Com. Dig. Pl. C. 60.



substantial performance, without alleging particularly how he performed it; as on a promise to pay so much as the plaintiff should expend for the officers of the army in such a suit; an averment that he spent so much is sufficient, without showing for what officers in particular.<sup>a</sup>

When a special request must be averred.

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9.—*Request.*] In point of form, there are in pleading two descriptions of request, the one termed a *special request*, it alleging by whom, and the time when, it was made; the other, the *licet sæpe requisitus*, or, “although often requested to do so.”<sup>b</sup> When, by the terms of the contract, it is incumbent on the plaintiff, before the commencement of his action, to request the defendant to perform his undertaking, a *special request*, being a condition \*precedent, must be stated in the declaration and proved.<sup>c</sup> As in an action for not delivering goods sold by the defendant to the plaintiff, or for not finding timber for repairs, a special request must be alleged and proved.<sup>d</sup> So, if the contract were to deliver up a bond to be cancelled on request.<sup>e</sup> For in such cases the request is part of the contract, and must be proved.<sup>f</sup>

Request to marry.

So, in an action for not marrying on request, the plaintiff should aver a request or some other allegation equivalent to it. Where, in an action by a gentleman against a lady, for a breach of promise to marry him within a reasonable time after request, the declaration stated that she “did not, nor would within such reasonable time, or at any time afterwards, marry the plaintiff, but hitherto wholly neglected and refused so to do;” after verdict for the plaintiff, held, on a motion in arrest of judgment, that these words necessarily implied a request to marry.<sup>g</sup>

When an actual request is not necessary.

It is a general rule, that where a mere duty, or sum of money which the defendant is in duty bound to pay, is promised to be performed or paid on request, there needs be no actual request; but where a collateral duty or sum is promised to be performed or paid on request, there must be an actual request.<sup>h</sup> A party is only bound to allege a request where the object of the request is to oblige another to do something.<sup>i</sup> In an action against an agent for not accounting, a request to account must be averred.<sup>j</sup> A request of payment should be

<sup>a</sup> Com. Dig. Pl. C. 61. *Jermy v. Jenny*, Sir T. Raym. 8.

<sup>b</sup> 1 Ch. Pl. 331.

<sup>c</sup> *Id.* Com. Dig. Pl. C. 69. 1 Saund. 33.

<sup>d</sup> *Back v. Owen*, 5 T. R. 409. Sir Wm. Jones, 56.

<sup>e</sup> 3 Bulstr. 299. It is only necessary to allege a request when the consideration is executed. Per Parke, B., in *Shillibeer v. Glyn*, 2 M. & W. 143, *ante*, 39. *King v. Sears*, 1 Gale, 241. 2 C. M. & R. 48.

<sup>f</sup> 1 Saund. 33.

<sup>g</sup> *Seymour v. Gartside*, 2 D. & R. 55. (16 Eng. C. L. 72.)

<sup>h</sup> 1 Saund. 33, *a.*

<sup>i</sup> Per Abbott, C. J., in *Amory v. Brodrick*, 5 B. & A. 714. (7 Eng. C. L. 237.)

<sup>j</sup> *Topham v. Braddick*, 1 Taunt. 572.

made on a sheriff, previous to an action for not paying over the proceeds of an execution.<sup>a</sup>

But where a party promises to pay on request money previously due, a special request need not be averred.<sup>b</sup> The \*bringing of the action is a request in law, and would be sufficient in that case.<sup>c</sup> No request is necessary where the defendant has, by his own act, rendered the performance of the contract by him impossible; as where, on a contract to deliver hay on request, it appeared that the defendant had otherwise disposed of it.<sup>d</sup> It has been held, that, though a promise be laid to pay on request, where a previous request is not necessary, the *licet sape requisitus* need not be laid or proved.<sup>e</sup> If a special request be unnecessarily stated, it need not be proved.<sup>f</sup> So, where it is not material, the averment of a request to pay the debt before it is due, will not vitiate it.<sup>g</sup> \*122

The omission of averring a special request, where by law it is necessary, is matter of substance, and may be taken advantage of on general demurrer;<sup>h</sup> and though it has been decided that it would not be aided by verdict;<sup>i</sup> yet the principle deducible from modern decisions is, that such omission is aided by verdict or judgment by default.<sup>j</sup> Consequence of omission.

10.—*Notice.*] It is frequently necessary to aver that the defendant had notice of some fact previously alleged in the declaration before commencement of the action; the rule in that respect appears to be, that wherever the circumstance which is alleged as the foundation of the defendant's liability, is more properly within the knowledge and privity of the plaintiff than of the defendant, then notice thereof to the defendant should be averred; as where the defendant promised to give the plaintiff so much for a commodity as another person would give; the plaintiff ought to aver having given notice to the defendant of the price which another person gave, because it was more properly within his knowledge.<sup>k</sup>(1) So, where the defendant promised to pay the plaintiff what damages he had \*sustained by a battery, or his costs of suit, the defendant should have notice of the amount of damages and costs in these cases.<sup>l</sup> \*123 So, notice of non-payment by the acceptor, must be given by the holder of a bill of exchange, to the other parties, when

<sup>a</sup> *Jefferies v. Shepherd*, 3 B. & A. 696. (5 Eng. C. L. 426.)

<sup>b</sup> B. N. P. 151.

*Simpson v. Routh*, 2 B. & C. 683. (9 Eng. C. L. 219.)

<sup>d</sup> *Bowdell v. Parsons*, 10 East, 359. And see *Amory v. Brodrick*, 5 B. & A. 716. (7 Eng. C. L. 236.) 1 D. & R. 361.

<sup>e</sup> *King v. Roxbrough*, 2 C. & J. 418. 2 Tyr. 468.

<sup>f</sup> *Barkley v. Thomas*, Plowd. 128.

<sup>g</sup> *Frampton v. Coulson*, 1 Wils. 33.

<sup>h</sup> *Bach v. Owen*, 5 T. R. 509.

<sup>i</sup> 1 Saund. 33. *a. note 2.*

<sup>j</sup> 1 Ch. Pl. 331. *Bowdell v. Parsons*, 10 East, 359.

<sup>k</sup> *Henning's Case*, Cro. Jac. 432.

<sup>l</sup> 1 Ch. Pl. 328. 2 Saund. 62. *R. v. Holland*, 5 T. R. 621. Hard. 42.

(1) (*Spooner v. Baxter*, 16 Pick. 409.)

he means to sue, it being a matter particularly within his knowledge.<sup>a</sup>

**When not** But where a matter does not lie more properly in the knowledge of one of the parties than the other, notice is not requisite as if a man contract to do a thing on the performance of an act by a stranger, or to give for a commodity so much as a third person *named*, notice need not be averred, for it is in the defendant's knowledge as much as the plaintiff's, and he ought to take notice at his peril.<sup>b</sup> So no notice need be given of an award unless there be an express stipulation to that effect.<sup>c</sup>

**Consequence of its omission.** The omission of an averment of notice, where it is necessary, may be taken advantage of by demurrer, or judgment by default;<sup>d</sup> but it is aided by verdict,<sup>e</sup> except in an action against the drawer of a bill, where the omission of the averment of notice of non-payment of the acceptor is fatal even after verdict.<sup>f</sup>

**Averment of breach.** 11.—*Breach.*] Where there are several counts in the declaration for a money demand, one breach may be so formed as to be applicable to all such counts. Where the first count of a declaration was against the defendant, as acceptor of a bill of exchange, stating a promise to pay the bill without any breach, and the money counts followed with a promise to pay limited to the latter counts, and the breach stated that he disregarded his promises, "and hath not paid the said moneys to the plaintiff;" held, sufficient.<sup>g</sup>

\*124 The allegation of breach must be governed by the nature of the contract. It should be assigned in the words of the contract, or in words co-extensive with the sense and effect of it.<sup>h</sup> Where there are several defendants, an averment that they have not paid suffices, for a payment by one is a payment by all.

In an action on the defendant's promise to pay the debt of a third person, a breach that the defendant did not pay the debt has been held in effect to agree with the terms of the contract.<sup>i</sup>

In assumpsit against a tenant, on his implied contract to manage, &c. a farm in a husband-like manner, according to the custom of the county, it was held sufficient, even on special demurrer, to assign as a breach, "that the defendant did not so manage, use, or cultivate the said farm, but, on the contrary,

<sup>a</sup> *Id.* Rushton v. Aspinall, Doug. 679.

<sup>b</sup> 2 Saund. 62, *n.* 1 Ch. Pl. 328. 1 Roll. Ab. 462. 1 Saund. 117. *n.* 2. Smith v. Goff, 2 Salk. 457. 2 Lord Raym. 1127.

<sup>c</sup> *Id.* Child v. Horden, 2 Bulst. 144.

<sup>d</sup> Henning's Case, Cro. Jac. 432.

<sup>e</sup> Palgrave v. Windham, 1 Stra. 212. 1 Saund. 228. Seymour v. Garside, 2 D. & R. 55, (16 Eng. C. L. 72,) *ante*, 121.

<sup>f</sup> 1 Ch. Pl. 329. Rushton v. Aspinall, Doug. 679.

<sup>g</sup> Turner v. Denman, 4 Tyr. 313. See Butterworth v. Le Despencer, 3 M. & S. 150.

<sup>h</sup> Com. Dig. Pl. C. 45. 1 Ch. Pl. 332.

<sup>i</sup> 1 Sid. 174. 2 Roll. 738.

cultivated it in an unhusband-like manner," &c., without alleging any particular acts of bad husbandry.<sup>a</sup>

If a contract be in the disjunctive, the breach should be assigned that the defendant did not do one act or the other; as if on a promise, to deliver a horse, or a sum of money, by a particular day, it should be denied that he did either.<sup>b</sup>

Where the contract is in the disjunctive.

But the breach must be assigned in terms co-extensive with the contract, and not vary from it. Thus in an action by the assignee, heir, or executor, the breach should be, that the defendant did not perform the act to the original contractor or the plaintiff. A declaration by husband and wife, or by an administrator, a breach merely stating that the defendant did not pay before marriage, or since the death, would be bad on demurrer, though aided by verdict.<sup>c</sup> Where the breach assigned was that the defendant did not use his farm in a husband-like manner, but, on the contrary, committed *waste*; it was held, that the plaintiff could not give evidence of the defendant's using the farm in an unhusband-like manner; that he was confined to evidence of such acts as amounted to *waste*, though, under the former words of the breach, such evidence would be admissible.<sup>d</sup>

Averment of breach must be co-extensive with contract.

\*The breach, however, should not be more large or extensive than the contract. As in a contract to repair a fence, except on the west side thereof, a breach that the defendant did not repair the fence, without showing that the want of repair was in other parts besides on the west, is bad on demurrer.<sup>e</sup> And if the matter to be performed by the defendant depend on a certain event, the happening of that event must be averred; as if the promise be to account for moneys to be received by the defendant, the receipt of money ought to be averred.<sup>f</sup>

\*125 But not more extensive.

The omission of a breach is fatal even after verdict, but the insufficiency or informal statement of it, provided there be sufficient matter on the whole to show a breach of contract, can be taken advantage of on demurrer only.<sup>g</sup> If one of several breaches, or a part of a breach, be improperly assigned, leaving a sufficient breach to support the count, the defendant cannot demur to the whole;<sup>h</sup> or if he does, the plaintiff may have judgment for the breaches, or part of the breach well assigned.<sup>i</sup> If one of several breaches be ill assigned, and

Consequence of its omission.

<sup>a</sup> Earl of Falmouth v. Thomas, 3 Tyr. 26. 1 C. & M. 89.

<sup>b</sup> 1 Sid. 440. Hard. 320. 1 Ch. Pl. 334. And see Plummer v. Woodbourne, 4 B. & C. 634. (10 Eng. C. L. 424.) 7 D. & R. 249. Colt v. Howe, Cro. Eliz. 348. Gyse v. Ellis, 1 Stra. 228.

<sup>c</sup> Elstob v. Thorowgood, 1 Lord Raym. 294. Hornsey v. Dimocke, 1 Vent. 119.

<sup>d</sup> Harris v. Mantle, 3 T. R. 307. Com. Dig. Pl. C. 47.

<sup>e</sup> Serra v. Wright, 6 Taunt. 45. (1 Eng. C. L. 304.)

<sup>f</sup> Hob. 198. 1 Sid. 440. Lunn v. Payne, 6 Taunt. 140. (1 Eng. C. L. 334.)

<sup>g</sup> Amory v. Brodrick, 5 B. & A. 712. (7 Eng. C. L. 236.) Orton v. Butler, *id.* 652. (7 Eng. C. L. 224.) Duffield v. Scott, 3 T. R. 374. Powdick v. Lyon, 11 East, 565. See Doe v. Dyeball, 8 B. & C. 70. (15 Eng. C. L. 154.) 1 Ch. Pl. 337.

<sup>h</sup> 1 Saund. 285.

general damages be given for the whole, judgment will be arrested.<sup>a</sup>

## SECTION XIV.

### THE PLEADINGS.

The new  
rules.

*General rules.*] By the general rules of H. T. 4 Will. IV, the general issue has been abolished in actions of assumpsit, except where it is given by particular statutes,<sup>b</sup> and the evidence admissible under non assumpsit much restricted.

The rules referred to are as follows:—

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Effect of  
non-as-  
sumpsit.

\*1. In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, of the matters of fact from which the contract or promise alleged may be implied by law.

Warranty.

*Ex. gr.* In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

Policy.

Bailees.

In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request,

Agents.

and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

Goods  
sold.

In an action of *indebitatus assumpsit*, for goods sold and delivered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money, and the existence of those facts which makes such receipt by the defendant a receipt to the use of the plaintiff.

Money  
had.

Bills and  
notes.

2. In all actions upon bills of exchange and promissory notes, the plea of *non assumpsit* shall be inadmissible. In such actions, therefore, a plea of denial must traverse some matter of fact; *ex gr.* the drawing or making, or indorsing,

<sup>a</sup> Sicklemore v. Thistleton, 6 M. & S. 9. A demurrer to the whole declaration, containing several breaches, one of which is good, is too large, and the plaintiff is entitled to judgment. Price v. Williams, 1 Gale, 362, *ante*, 119.

<sup>b</sup> Per Park, J., in Barnett v. Glossop, 1 Hodges, 95. 1 Bing. N. C. 633. (27 Eng. C. L. 522.)

or accepting, or presenting, or notice of dishonor of the bill or note.

Where, in assumpsit by an executor on a promissory note, the declaration stated that the note was payable to the testator and alleged a promise to pay the executor; held, that notwithstanding the new rules, non assumpsit was a good plea; for the new rules prohibited the plea of non assumpsit, where the action was *only* on the note, and on the promise to pay contained in, or implied by law from it; but this was not an action on the note in the sense of the rule, it was brought on an express promise to the executor, which it was necessary to aver; the effect of the plea was to admit that the note was signed by the defendant, but to deny that he had made any promise to the executor.<sup>a</sup>

3. In every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise shall be specially pleaded; *ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set-off, mutual credit unseaworthiness, <sup>\*</sup>misrepresentation, concealment, deviation, and various other defences, must be pleaded. Matters in confession and avoidance. \*127

4. In actions on policies of assurance the interest of the assured may be averred thus:— Policies of insurance.

“That *A.*, *B.*, *C.* and *D.*, or some or one of them, were or was interested,” &c. And it may also be averred, “that the insurance was made for the use and benefit, and on the account of the person or persons so interested.”

## SECTION XV.

### NON ASSUMPSIT.

UNDER the plea of non assumpsit the defendant may give evidence to show the non-performance of a specific contract, or that there was no contract at all; or that he did not contract in the manner alleged in the declaration.<sup>b</sup> Under non-assumpsit to indebitatus assumpsit for work and labor, or goods sold, &c., the defendant may show that the work was not done in a workman-like manner, or pursuant to the contract, or that such goods as were stipulated for were not delivered, although there What may be given in evidence under a plea of non assumpsit.

<sup>a</sup> *Timmis v. Platt*, 2 Mees. & Wels. 720.

<sup>b</sup> Per Parke, B., in *Cousins v. Paddon*, 1 Gale, 307, 8. 2 C. M. & R. 567, *ante*, 79. *Jones v. Nanney*, 1 M. & W. 333.



be a special contract to pay for the work or goods at a certain price; for until a *full performance*, the defendant is not liable on the specific contract; and no debt or promise can be implied; the defendant therefore is only liable on a *quantum meruit*.<sup>a</sup>

So under this plea to assumpsit for goods sold, the defendant may show that the time of credit had not expired at the commencement of the action; for there was then no cause of action. The contract declared upon alleging a debt payable *on request*, is different from the contract proved.<sup>b</sup> So the \*defendant may show the non-joinder of a person who ought to be joined as co-plaintiff, which is a ground of nonsuit in respect of the *variance*; or that the contract was conditional, and part not performed by the plaintiff, where he had declared on the contract as being absolute.<sup>c</sup> So in an action against two or more jointly, they may show under non assumpsit that they are not jointly liable; for the plaintiff must fail if he does not establish a joint contract against all.<sup>d</sup> So under this plea the defendant may show a partnership between him and the plaintiff.<sup>e</sup> So he may show that the contract declared upon was not made by him with the plaintiff, but with another party.<sup>f</sup> Under non assumpsit payment may be given in evidence in reduction of damages; but not as a bar to the action.<sup>g</sup>

Joint liability.

Partnership.

Payment.

In assumpsit for use and occupation, the defendant may show under non assumpsit, that he had received notice to pay rent to the mortgagee of the premises; for the effect of the notice is, that a new tenancy is created between the defendant and the mortgagee; and it affords proof that the subsequent holding is not by the permission of the plaintiff, as alleged in the declaration, but by the permission of the mortgagee, which amounts to a denial of a matter of fact stated in the declaration, from which the promise in law is implied. But the same construction of the rule of pleading, does not apply to rent due before the receipt of the notice; for up to that time the defendant occupied by the permission of the plaintiff.<sup>h</sup> So in assumpsit on a contract, the defendant may, under non assumpsit,

<sup>a</sup> *Id.* Cooper v. Whitehouse, 6 C. & P. 545. (25 Eng. C. L. 535.) Non assumpsit to indebitatus assumpsit, puts in issue all the facts essential to establish a *present debt*; although in case of a *special count* it would be otherwise. 1 Ch. Pl. 513.

<sup>b</sup> Broomfield v. Smith, 1 M. & W. 543. Taylor v. Hilary, 1 Gale, 24. 1 C. M. & R. 741. Per Parke, B., in Cousins v. Paddon, *supra*—overruling Edmunds v. Harris, 2 Ad. & Ell. 414. (29 Eng. C. L. 126.) 4 N. & M. 182. Where it was held, that the defendant must plead specially that the time of credit had not elapsed.

<sup>c</sup> 1 Ch. Pl. 513. Neale v. M'Kenzie, 2 C. M. & R. 67. Alexander v. Gardener, 3 Dowl. 146. Grounsell v. Lamb, 1 M. & W. 352.

<sup>d</sup> Eliot v. Morgan, 7 C. & P. 334. Coleridge.

<sup>e</sup> Per Parke, B., in Pearson v. Skelton, 1 M. & W. 504.

<sup>f</sup> Per Lord Denman and Patteson, J., in Gilbart v. Dale, 1 N. & P. 22.

<sup>g</sup> Shirley v. Jacobs, 3 Bing. N.C. 88. (29 Eng. C. L. 266.) Lidiard v. Boucher, 7 C. & P. 1.

<sup>h</sup> Waddilove v. Barnett, 2 Bing. N. C. 538. (29 Eng. C. L. 410.) 1 Hodges, 395. See Pope v. Bigg, 9 B. & C. 245. (17 Eng. C. L. 368.)



give in evidence another contract entered into between the parties, inconsistent with that declared upon; or show that there was a condition to be performed by the plaintiff, which he neglected to perform.<sup>a</sup>

But in assumpsit on a special contract the defendant cannot show under non assumpsit, that there was no consideration for the promise, for if there was no consideration the contract is void, and all matters which show the transaction to be void or voidable in point of law, must be specially pleaded.<sup>b</sup>

It has been decided that under *non assumpsit to indebitatus assumpsit* for goods sold and delivered, the defendant cannot show that the goods were of no value.<sup>c</sup> But the authority of this decision is very questionable; for indebitatus assumpsit alleges an *existing debt* from which a promise is inferred, and it is competent to the defendant under *non assumpsit*, to negative those facts from which the promise is implied. He may show, that he was not indebted in manner alleged in the declaration; he may show that the goods supplied did not correspond with the contract; and if he establishes that fact, he will be liable only on a *quantum valebant*, and may therefore prove that the goods were of no value.<sup>d</sup>

In an action on the warranty of a horse, the defendant cannot under *non assumpsit* show that the horse was sound at the time of the sale.<sup>e</sup>

\*If a contract be void by statute or otherwise, such defence must be specially pleaded. Under non assumpsit *to assumpsit*, for the price of the copyright of a play bargained and sold to the defendant; it was held, that the defendant could not object that the assignment of the copyright was void, as not being in writing pursuant to the 8 Ann, c. 19, and 3 & 4 W. IV, c. 15; for the rules expressly require, that matters which show the transaction to be void or voidable *in point of law*, shall be specially pleaded.<sup>f</sup> So it has been held that, under this plea, the defendant cannot show that the contract was void by the statute of frauds.<sup>g</sup> So in assumpsit for demurrage upon an agreement in the nature of a charter-party; it was held, that the defendant could not, under non assumpsit, object that the plaintiffs had not proved their compliance with the provisions of 3 and 4 W. IV, c. 52, s. 108, which required them to give certain notices, and obtain certain documents previous to their unloading the goods.<sup>h</sup>

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It cannot be objected under non assumpsit that the contract was void, or that the plaintiff had not complied with the statutory provisions

In an action by the composer of music against the vendee of

<sup>a</sup> Morgan v. Pebrer, 3 Bing. N. C. 457. 3 Hodges, 8.

<sup>b</sup> Passenger v. Brookes, 1 Hod. 123. 1 Bing. N. C. 587. (27 Eng. C. L. 498.)

<sup>c</sup> Roffey v. Smith, 6 C. & P. 662. (25 Eng. C. L. 585.) Per Lord Denman.

<sup>d</sup> Cousins v. Paddon, *supra*.

<sup>e</sup> Smith v. Parsons, 8 C. & P. 200. Abinger.

<sup>f</sup> Barnett v. Glossop, 1 Hod. 94.

<sup>g</sup> Ross v. Humphreys, sutt. E. T. 1835. Coram Bolland, B., 1 Ch. Pl. 515. See Clancey v. Pigott, 1 H. & W. 20. 4 N. & M. 496. 2 Ad. & Ell. 473. (29 Eng. C. L. 147.)

<sup>h</sup> Alcock v. Taylor, 6 N & M. 296.

the copyright, the defendant cannot show under *non assumpsit* that the plaintiff was not the author; or that he had no right to dispose of it; or that there was no transfer of the copyright by deed.<sup>a</sup>

Unless the statute makes proof of compliance with its provisions part of the plaintiff's case. If, however, a statute requires any thing to be proved by the plaintiff in order to establish his case, the defendant may object, under *non assumpsit*, that the plaintiff has not complied with its provisions; as the apothecary act, 55 Geo. III, c. 194, s. 21, (amended by 6 G. IV, c. 133,) which enacts, "that no apothecary shall be allowed to recover any charges claimed by him in a court of law, unless he shall *prove* on the trial, that he was in practice as an apothecary prior to, or on the 1st day of August, 1815, or that he has obtained a certificate, &c."

Under *non assumpsit*, in an action to recover the amount of an apothecary's bill, the plaintiff is bound to prove that he is an apothecary within the 55 Geo. III, c. 194, s. 21.<sup>b</sup> And it makes no difference in that respect, that the defendant has pleaded a tender to part of the plaintiff's demand.<sup>c</sup>

Under a non assumpsit to a count for work and labor, the defendant may show that the work was done under an agreement that the plaintiff should receive no remuneration for his services, if, as the event was, they should prove unsuccessful.<sup>d</sup>

In assumpsit on an apothecary's bill, it was held, that the defendant might object under *non assumpsit*, that the plaintiff did not prove his qualification as above, for such proof is a condition precedent to the plaintiff's recovery, and by the statute made part of his case. If it were a matter for the defendant to give in evidence it should be specially pleaded.<sup>e</sup> It would seem, that upon the same principle, the insufficiency of the stamp might be objected to under non assumpsit, when a written contract must be proved: \*for the 23 Geo. III, c. 58, s. 12, enacts, not only that an agreement, unless duly stamped, shall be unavailable; but further, that it shall not be admissible *in evidence*; so that the plaintiff cannot prove the allegation, that it was made if it be unstamped.<sup>f</sup>

\*130  
Insufficiency of stamp.

Attorney's bill.

In assumpsit on an attorney's bill, it *seems* that the defendant cannot, under *non assumpsit*, object that the plaintiff has not delivered a signed bill, &c., pursuant to the 2 Geo. II, c. 23, s. 23, the words of which are, "that no attorney shall *commence or maintain* any action or suit for the recovery of fees, &c., until the expiration of a month after he shall have delivered a bill."<sup>g</sup> Where the plaintiff sued on an account stated

<sup>a</sup> De Pinna v. Polhill, 8 C. & P. 78. Tindal.

<sup>b</sup> Shearwood v. Hay, 2 H. & W. 249. 5 Ad. & Ell, 383.

<sup>c</sup> Willis v. Langridge, 5 Add. & Ell. 383. 2 H. & W. 250.

<sup>d</sup> Hayselden v. Staff, 6 Nev. & M. 659. 2 H. & W. 204. Hill v. Allen.

<sup>e</sup> Morgan v. Ruddock, 1 H. & W. 505. 1 Ch. Pl. 514.

<sup>f</sup> In Moore v. Dent, tried at the Durham Assizes, Parke, B., decided that under *non assumpsit* an attorney need not prove the delivery of a bill. Yet when this case was cited in the Common Pleas, Park, J., said that the inclination of his opinion was the other way. Burke v. Mordaunt, 1 Hodges, 196, n. See Moore v. Boulcott, 1 Bing. N. C. 323. (27 Eng. C. L. 404.) 5 M. & Scott, 122. 3 Dowl. 145.

on the 5th of February, the balance of which was in his favor; Account it was held, that under *non assumpsit* the defendant could not stated. give in evidence a subsequent account stated on the 10th of March, in which the balance was against the plaintiff; he ought to have pleaded payment or a set-off.<sup>a</sup> So in assumpsit against a carrier, for the loss of a parcel above the value of 10*l.*, the Carrier. defendant cannot give in evidence under *non assumpsit*, the defence given by the carrier's act, that the value of the articles had not been declared at the time of delivery.<sup>b</sup>

In assumpsit against a common carrier, for goods which he lost through negligence, the defendant may show, under non assumpsit, that he had received the goods on an express condition and agreement, that the plaintiff should accompany his cart and protect the goods, but that he neglected to do so; for it is a qualification of the contract declared upon.<sup>c</sup>

So in special assumpsit for not completing the sale of a Puffing at house; it has been held that the defendant cannot show under auctions.

*non assumpsit* that the sale was void on account of puffing.<sup>d</sup>

So in assumpsit on an attorney's bill of costs, it cannot be objected under *non assumpsit*, that the costs were incurred in Illegal a-preparing and performing agreements which had been declared greement.

illegal; for the rule requires that the illegality should be pleaded, and there is no distinction between cases where the illegality arises on the agreement which is the subject of the suit, and where the claim is for illegal services, and from which therefore no \*contract to pay for them could be inferred.<sup>e</sup> So, \*131

if it be objected to a contract that it was made on a Sunday, Sunday.

and therefore void, it must be specially pleaded.<sup>f</sup> Under *non assumpsit* to assumpsit for goods sold; the defendant cannot Collateral show that after the goods were sold and delivered a bond was matter. entered into, to alter the situation of the parties, by merging the simple contract in the specialty;<sup>g</sup> nor can he show that there was a false representation respecting the quality of the goods.<sup>h</sup>

Assumpsit against a husband for board and lodging furnished In an action to his wife, plea *non assumpsit*. An arbitrator, to whom the against a cause was referred, admitted evidence of the wife's adultery, husband and decided for the defendant. On a motion to set aside the for necessities supplied to award, on the ground of evidence of adultery having been im- wife, properly admitted under *non assumpsit*, it was not denied by counsel that the evidence was inadmissible, and Tyndal, C. J., *quære* if said, "put it as you please, it is only that an inadmissible witness has been called. His admissibility was a question of law, evidence

<sup>a</sup> Fidgett v. Penny, 1 C. M. & R. 108. 4 Tyr. 650.

<sup>b</sup> Brind v. Dale, 2 Mees. & Wels. 775.

<sup>c</sup> Syms v. Chaplin, 1 N. & P. 129. See Owen v. Burnet, 2 C. & M. 353, *post*.

<sup>d</sup> Iceley v. Grew, 6 C. & P. 671. (25 Eng. C. L. 590.)

<sup>e</sup> Potts v. Sparrow, 1 Bing. N. C. 594. (27 Eng. C. L. 502.) 1 Hod. 135.

<sup>f</sup> Peate v. Dickens, 1 C. M. & R. 422.

<sup>g</sup> Per Tyndal, C. J., in Weston v. Foster, 2 Bing. N. C. 700. (29 Eng. C. L. 461.)

<sup>h</sup> Woodhouse v. Swift, 7 C. & P. 316.

of adultery may be given under non assumpsit.

which has been decided by the arbitrator; you must take his law for better and worse."<sup>a</sup>

Though the court and counsel seemed to consider that the evidence was improperly received in this case, it is, notwithstanding, submitted that it is not quite clear that evidence of adultery is not admissible under non assumpsit in such action; for the promise alleged in the declaration is implied from the husband's liability to support his wife. If she has committed adultery he ceases to be liable. Under *non assumpsit* he may negative those facts from which the promise is implied; that is, he may show that he was not liable to support his wife in consequence of her having committed adultery.

It would seem that *non assumpsit* may put the consideration in issue, even where there is an *express* promise; for it puts the contract in issue, and the consideration is an essential part of the contract.

\*132 *Quere* if the consideration is at issue under non assumpsit

In an action on an undertaking not to pirate the plaintiff's \*inventions signed by the defendants pursuant to an award; the defendants pleaded non assumpsit. There being no evidence to connect the undertaking with the previous transaction, or to show that the defendants had submitted to the arbitration, or in other words, to connect the promise with the consideration alleged in the declaration; on a motion to set the verdict for the plaintiff aside and enter a nonsuit, it was contended that the plaintiff should have proved not only the promise set out, but also that the promise was made on the consideration alleged; for *non assumpsit* puts in issue, the manner and form of the promise, as well as the promise itself, and the manner and form of a promise includes the consideration; but the court refrained from expressing any opinion on that point. Tyndal, C. J., in delivering the judgment of the court said, "without giving any opinion whatever on that abstract question, we think the objection cannot in any event be allowed in this case; first, because the objection was not taken at the trial, which if taken at that time might be removed by further evidence; and secondly, because we see no other state of facts different from those alleged in the declaration to which the promise can by possibility apply."<sup>b</sup>

## SECTION XVI.

### ACCORD AND SATISFACTION.

AN accord and satisfaction might formerly have been given in evidence under the general issue; but since the general rules

<sup>a</sup> Symes v. Goodfellow, 2 Bing. N. C. 532. (29 Eng. C. L. 408.)

<sup>b</sup> Stuart v. Nicholson, 3 Bing. N. C. 113. See Gilbart v. Dale, 1 N. & P. ante, 128.

H. T. 4 W. IV, it must be pleaded specially. A mere accord without satisfaction is not sufficient,<sup>a</sup> and the satisfaction must appear to the court to be reasonable. Payment of a smaller sum cannot be pleaded in satisfaction of a greater, where the debt is liquidated, but it is otherwise in case of an unliquidated debt.<sup>b</sup> Therefore, where the defendant pleaded that he had given his promissory note for 5*l.* in satisfaction of a debt of 15*l.*, \*and that the plaintiff received it in satisfaction, the court held, that the plea was not good; for it was not sufficient that the plaintiff agreed to receive it in satisfaction of the debt, it should appear to the court to be a reasonable satisfaction.<sup>c</sup> So where the defendant compounded with his creditors, including the plaintiff at 7*s.* in the pound, and promised to pay them the residue of the debt when he should be of ability to do so, which he was proved to have been before action brought, and the plaintiff gave him a receipt for the composition of 7*s.* acknowledging it to be in full of all demands; the court held, that the defendant was liable to pay the residue, as there was no consideration for the relinquishment of it; an acceptance of part, could not operate as an extinguishment of the whole of the debt; unless there was something collateral to show the possibility of a benefit to the party relinquishing his further claim, the agreement was *nudum pactum*.<sup>d</sup>(1)

Payment of a smaller sum is not adequate satisfaction for a greater.

\*133

But an agreement to accept a lesser sum, with the security of a third person for the payment of it, will be binding on the creditor.(2) As where a debtor by an agreement, not under seal, engaged to pay his creditors 20*l.* per cent., which they agreed to receive in satisfaction of their several demands, in consideration that half of the composition should be secured by the acceptance of a third person; held, that such agreement was binding on the creditors, and that the plaintiff, who, as a creditor had received such security and had been paid the amount, could not sue the debtor for the residue.<sup>e</sup>

An agreement to accept a lesser sum, with security for the residue, is sufficient.

An agreement to give time for the payment and to take the debtor's promissory notes for the amount, deprives the creditors of a right of suing on the original cause of action, unless they can show that the agreement had been broken on the part of the debtor.<sup>f</sup> But where the plaintiff agreed with the defendant and the rest of the defendant's creditors to take a composition, to be secured by promissory notes to be given by the defendant, payable on certain days, and that the defendant

<sup>a</sup> Heathcote v. Crookshanks, 2 T. R. 24.

<sup>b</sup> Per Parke, J., in Wilkinson v. Byers, 1 Ad. & Ell. 113. (28 Eng. C. L. 51.)

<sup>c</sup> Cumber v. Wane, Stra. 426.

<sup>d</sup> Fitch v. Sutton, 5 East, 230.

<sup>e</sup> Steinman v. Magnus, 11 East, 390. See what Holroyd, J., says in Lewis v. Jones,

<sup>f</sup> B. & C. 513. (10 Eng. C. L. 395.)

<sup>g</sup> Boothby v. Snowden, 3 Camp. 175.

(1) (So the mere acceptance of a dividend under a voluntary assignment is no bar. *Allen v. Roosevelt*, 14 Wend. 100.)

(2) (*Booth v. Smith*, 3 Wend. 66. *Kellogg v. Richards*, 14 Wend. 116.)

\*134 should assign to the creditors certain debts, upon which they should execute a general release, and the assignment was executed, and all the creditors \*except the plaintiff received their composition, and executed a release: held, that though the plaintiff might have received his promissory notes if he had applied for them, he was not precluded by the agreement from suing on the original demand. Lord Ellenborough, C. J.: "The rule is, that a person to be discharged is bound to do the act which is to discharge him, and not the other party. If the defendant had offered the notes at the time of the action brought, it might have been a ground for staying the proceedings."<sup>a</sup>

But if the debtor performs his part, and if it be the creditor's own fault that the agreement is not executed, he is precluded from resorting to the original contract.

Accord  
and tender  
of satis-  
faction is  
sufficient.

As where creditors agreed to take a composition to be secured partly by the acceptances of a third person, and partly by the notes of the debtor, and to execute a composition deed containing a clause of release; it was held, that the debtor could not be sued for the original debt due to a creditor, who had promised to come in under the agreement, to whom the acceptances and notes were regularly tendered, and who refused to execute the composition deed after it had been executed by all the other creditors; for though accord is no bar without satisfaction, yet a party is not to be permitted to say, there is no satisfaction, to whom satisfaction has been tendered according to the terms of the accord.<sup>b</sup>

## SECTION XVII.

### INFANCY.

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1.—*Infancy, how pleadable.*] INFANCY might formerly have been given in evidence under the general issue, but by the new rules it must now be pleaded specially. The proof of a plea of infancy lies upon the defendant.<sup>c</sup>

\*135 \*In an action against an infant, he should appear by guardian, or *prochein ami*; if he appears in person, or by attorney,

<sup>a</sup> Cranley v. Hillary, 2 M. & S. 120. Oughton v. Trotter, 2 Nev. & M. 71. (28 Eng. C. L. 353.) S. P.

<sup>b</sup> Bradley v. Gregory, 2 Camp. 383.

<sup>c</sup> Jeune v. Ward, 2 Stark. 328. (3 Eng. C. L. 367.)



it will be error, of which he may avail himself if judgment be against him.<sup>a</sup>(1) And if the plaintiff enter an appearance for him by attorney, it is irregular, and all the subsequent proceedings may be set aside, even after a writ of inquiry executed. And a motion to set aside such proceedings may be made by an attorney, or the infant's father; provided it appear to be with the consent of the infant.<sup>b</sup> But if judgment be given in favor of an infant defendant, as if the plaintiff be nonsuited, the latter cannot avail himself of the infant's appearing by attorney as a ground of error, for it would operate to the prejudice of the infant.<sup>c</sup> A special admission of *prochein ami*, or guardian, to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified.<sup>d</sup>

Infant should appear by guardian or *prochein ami*.

Contracts entered into by a person within the age of twenty one years, are not binding, unless they be for the supply of necessities, or unless he has confirmed them after he has attained that age.

2. *What are necessities.*] The term "necessaries" is not to be confined to such things as are essential to the infant's personal support; but it is a relative fact to be governed by the rank, station, and circumstances of the infant.<sup>e</sup> Therefore, a livery for the servant of an infant, who was a captain in the army, was \*held to be necessities, for which he was liable: \*136 but he was considered not to be responsible for cockades supplied for some of the soldiers belonging to his company.<sup>f</sup> A stanhope is not a necessary for an infant who sold out a commission which he held in the army, by reason of his not having a sufficient fortune to hold it.<sup>g</sup>

Necessaries is a relative expression.

<sup>a</sup> Castledine v. Mundy, 4 B. & Ad. 90. (24 Eng. C. L. 30.) 1 N. & M. 635. Beven v. Cheshire, 3 Dowl. 70. Hindmarsh v. Chandler, 7 Taunt. 488. (11 Eng. C. L. 183.) 1 Moore, 250. Paget v. Thompson, 3 Bing. 609. (13 Eng. C. L. 69.) 11 Moore, 504.

<sup>b</sup> Nunn v. Curtis, 4 Dowl. 729.

<sup>c</sup> Bird v. Pegg, 5 B. & A. 418. (7 Eng. C. L. 153.)

<sup>d</sup> Reg. Gen. H. T. 2 W. IV. Common bail cannot be filed for an infant under the statute, even though he be sued jointly with others. Bligh v. Munster, 1 Tidd's Practice, 95. Where a party becomes the guardian on record of an infant, he is liable to pay the attorney's bill, though he did not interfere in the conduct of the cause, nor was in any way interested in the event. Marnell v. Pickmore, 2 Esp. 473. See Evans v. Davis, 1 C. & J. 460. 1 Tyr. 345. If money be paid into court where there is a plea of infancy, the defendant may still avail himself of his infancy. Hitchcock v. Tyson, 2 Esp. 481, *n. a.*

<sup>e</sup> Per Lord Kenyon, C. J., in Ford v. Fothergill, 1 Esp. 212. Hands v. Slaney, 8 T. R. 578. Com. Dig. Infant, B. 5.

<sup>f</sup> Hands v. Slaney, 8 T. R. 578.

<sup>g</sup> Charters v. Bayntun, 7 C. & P. 52. The word necessities is a term of a wide and accommodating meaning, it has been held to include not only food and clothing, but also the costs of education and instruction. Per Tyndal, C. J., in Lowe v. Griffiths, 1 Hodges, 31. The question of necessities must ever have respect to the sta-

(1) (*The People v. New York Common Pleas*, 11 Wend. 164.)



On what contracts an infant is liable.

An infant is liable, on arriving at full age, for a reasonable fine assessed during infancy, in respect of a copyhold estate which has descended to him.<sup>a</sup> So necessaries for an infant's wife are necessaries for him; but if provided only in order for the marriage, he is not chargeable, though she use them.<sup>b</sup> So a contract entered into by an infant, for the nursing of his lawful child, is binding.<sup>c</sup> So an infant is liable for money paid to release him from custody in *execution*, without showing that the original debt was for necessaries; *aliter* if he were in custody only on *mesne* process, when the party paid the debt for him.<sup>d</sup> A promise by a child of fourteen years of age to pay a reasonable sum for board, lodging and schooling, is binding on him.<sup>e</sup>

What are not necessities.

An infant is not liable on the warranty of a horse,<sup>f</sup> nor on a bill of exchange, though given for necessaries,<sup>g</sup>(1) nor for money lent, though laid out in necessaries;<sup>h</sup> nor upon an account stated, even though it appears to be for necessaries.<sup>i</sup>

\*137 lieutenant \*in the royal navy, under the age of twenty-one, was held not to be responsible for the price of a chronometer supplied to him at a time when he was not in commission, there being no evidence that it was essential that he should have such an article.<sup>j</sup> It is incumbent on a tradesman, before he trusts an infant with what may appear necessaries, to inquire whether he is provided by his friends.<sup>k</sup> For if proper clothes are supplied to an infant by his father, any others furnished in addition cannot be considered necessaries.<sup>l</sup> The education of an infant, when placed at a school by his parents, is not deemed a necessary to charge him, for it shall be implied that credit was given to his parents only.<sup>m</sup>

If a tradesman trusts an infant he can re-

An infant, living under the roof of his parent, who provides every thing which in his judgment appears to be proper, cannot bind himself to a stranger, even for such articles as might, under other circumstances, be deemed necessaries.<sup>n</sup> A tailor

tion in life of the individual, and is a matter entirely for the consideration of the jury. Per Park, J., *ib.*

<sup>a</sup> Evelyn v. Chichester, 3 Burr. 1717. See Kirton v. Elliott, 2 Buls. 69.

<sup>b</sup> Turner v. Tresby, 1 Stra. 168 B. N. P. 155.

<sup>c</sup> B. N. P. 155.

<sup>d</sup> Clarke v. Leslie, 5 Esp. 28.

<sup>e</sup> Sir W. Jones, 182. Palmer, 528. An infant may bind himself for his teaching and instruction, whereby he may profit himself afterwards. Co. Lit. 172, a.

<sup>f</sup> Howlet v. Haswell, 4 Campb. 118.

<sup>g</sup> Williams v. Watts, 1 Campb. 552. Charters v. Bayntun, 7 C. & P. 52.

<sup>h</sup> Darby v. Boucher, 1 Salk. 279.

<sup>i</sup> Ingledew v. Douglass, 2 Stark. 36. (3 Eng. C. L. 233.) Trueman v. Hurst, 1 T. R. 42.

<sup>j</sup> Berolles v. Ramsay, Holt, 77. (3 Eng. C. L. 32.)

<sup>k</sup> Ford v. Fothergill, Peake, 229.

<sup>l</sup> Cook v. Denton, 3 C. & P. 114. (14 Eng. C. L. 232.) Story v. Pery, 4 C. & P. 526. (19 Eng. C. L. 508.)

<sup>m</sup> See note 5, *supra*. Duncomb v. Tickridge, Alleyne, 94.

<sup>n</sup> Per Gould, J., Bainbridge v. Pickering, 2 Bl. 1325, and per Bayley, J., Borrinsale v. Greville, Sel. N. P. 129.

(1) (An infant may bind himself by an express contract for necessaries, if the form of the contract is such, that the consideration may be inquired into. Stone v. Dennison, 13 Pick. 1.)

who supplies an infant with clothes cannot recover for more than are necessary in the then actual state of his wardrobe, and if the infant has ordered clothes from other tailors, evidence of that fact is admissible to show the state of his wardrobe.<sup>a</sup>

Where an infant has an allowance made to him by his guardians for his support, a tradesman is not entitled to be paid for articles supplied to the infant on credit, unless he can make out that, having regard to the infant's circumstances and station, (which he is bound to inquire into,) the articles were necessities.<sup>b(1)</sup>

Where in assumpsit against executors for necessities supplied to the testator, who was an infant, it appeared that the testator held a commission in the army, and that he had an income of 500*l.* a year; Lord Abinger told the jury that if they considered the income sufficient to pay for necessities, the infant was not liable for goods supplied on credit. Verdict for the defendant.<sup>c</sup>

Although an infant entering into partnership with other persons is not responsible for the debts contracted during his infancy, while he is so a partner, yet he may by law be a partner and be entitled to all the benefits resulting from the partnership, though he will not be liable for the losses, if he chooses to take advantage of his infancy.<sup>d</sup>

**\*3.—Replication.]** To a plea of infancy, the plaintiff may reply that the goods were necessities, and suitable to his station in life.<sup>e</sup> But it should appear in the replication that they were necessities for the infant. Where to assumpsit for a farrier's bill the defendant pleaded infancy, and the plaintiff replied that the work was done necessarily for the horses of the defendant, it was held ill; for though the work might be necessary for the horses, *non constat* that the horses were necessary for the infant; it ought to have been a general replication of necessities,<sup>f</sup> or that the defendant ratified the contract after he became of age, and before action brought.<sup>g</sup> Evidence of a promise made after the commencement of the action, will not support such a replication.<sup>h</sup>

The confirmation of such a contract, must, however, be voluntary, and the promise must be given with a knowledge that he then stood discharged by law. Where an infant, under the terror of an arrest, had a promise extorted from him, or where

An infant is not liable for necessities supplied on credit, if he has the means of paying ready money. Infant partner.

Ratification after full age.

The ratification must be voluntary,

<sup>a</sup> *Burghart v. Angerstein*, 6 C. & P. 690. (25 Eng. C. L. 600.)

<sup>b</sup> *Mortara v. Hall*, 6 Simon, 465.

<sup>c</sup> *Burghart v. Hall*, *Coram* Lord Abinger, C. B., Sitt. after T. T. 1837, rule for new trial granted.

<sup>d</sup> Per Holroyd, J., *Goode v. Harrison*, 5 B. & A. 159. (7 Eng. C. L. 54.)

<sup>e</sup> *Trueman v. Hurst*, 1 T. R. 40.

<sup>f</sup> *Clowes v. Brooke*, 2 Stra. 1101.

<sup>g</sup> *Thornton v. Illingworth*, 2 B. & C. 824. (9 Eng. C. L. 256.)

<sup>h</sup> *Ib.*

(1) (An infant cannot bind himself for necessities, when he has a guardian or parent to supply his wants. *Guthrie v. Murphy*, 4 Watts, 80.)

it was given in ignorance of the protection which the law afforded him, such promise would not be binding.<sup>a</sup>

And in writing.

The promise confirming the contract must be express; a bare acknowledgment of the debt by the payment of a sum on account of it, will not be sufficient,<sup>b</sup> and it must be in writing, signed by the party to be charged therewith.<sup>c</sup> Where the plaintiff replies a ratification of the contract, &c., it will be sufficient for him to prove the promise in the first instance, and the defendant must prove his infancy, if he means to take advantage of it, as it is a fact which rests within his own knowledge, and it is to be presumed that when a man contracts he is of proper age to contract, until the contrary be shown.<sup>d</sup>

Notice of disaffirmance of contract after age.

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In case of a continuing contract, voidable only by an infant on coming of age, the infant is bound to give notice of disaffirmance of such contract in reasonable time, and where he did not give such notice within four months after his attaining his majority, it was considered not to be within a reasonable time; but the opposite party may dispense with notice of such disaffirmance, and it may be a question for the jury whether their conduct implied a dispensation with formal notice.<sup>e</sup>(1)

Where an infant held himself out as in partnership with *J. S.*, and continued to act as such till within a short period of his coming of age, but there was no proof of his doing any act as a partner after twenty-one; held, that it was his duty to notify his disaffirmance of the partnership on arriving at twenty-one, and as he had neglected to do so, that he was responsible to persons who had trusted *J. S.* with goods subsequent to the infant's attaining twenty-one, on the credit of the partnership; for, per Abbott, C. J., "If once a person holds himself out as being a partner, till he gives notice that he has ceased to be so, those who deal with the firm upon the faith of the supposed partnership, may consider him as such, and he is bound by that representation."<sup>f</sup>

Contracts for the

4.—*Trade.*] In the case of an infant, a contract made for goods for the purposes of trade is absolutely void and not

<sup>a</sup> Per Lord Alvanley, *Harmer v. Killing*, 5 Esp. 103.

<sup>b</sup> *Thrupp v. Fielder*, 2 Esp. 628.

<sup>c</sup> 9 Geo IV, c. 14, s. 5.

<sup>d</sup> *Borthwick v. Carruthers*, 1 T. R. 648. Infancy may be proved by calling any party who can speak to his birth, or by declarations of deceased members of his family. The register of his birth, with proof of his identity, is good evidence. *Leader v. Barry*, 1 Esp. 354. But the register of his baptism is not of itself sufficient. *Wilson v. Law*, 3 Stark. 63. (14 Eng. C. L. 163.) Nor is a register of the christening. *R. v. North Petherton*, 5 B. & C. 508. (11 Eng. C. L. 290.)

<sup>e</sup> *Holmes v. Blogg*, 8 Taunt. 40. (4 Eng. C. L. 10.)

<sup>f</sup> *Goode v. Harrison*, 5 B. & A. 147. (7 Eng. C. L. 49.) If an infant make a lease rendering rent, it is at all events only voidable; and if he accept rent at full age, without dissent, he cannot afterwards avoid the demise. *Ashfield v. Ashfield*, Sir Wm. Jones, 157. Chitty on Con. 125.

(1) (In what cases the contracts of infants are void, and when they are voidable only. See *Fridge v. The State*, 3 Gill and Johns. 103. *Fonda v. Van Horne*, 18 Wend. 631. *Dalrymple v. Lamb*, 3 Wend. 479.

voidable only; the law considers it against good policy that he should be allowed to bind himself by such contracts.<sup>a</sup> trade.

*Assumpsit* for work and labor; plea, infancy. It appeared that the plaintiff was a writing painter, and the defendant a painter and glazier; and the work done by the plaintiff was painting and gilding letters for the defendant's customers; held, by Lord Kenyon, C. J., that the action was not maintainable; for as the law did not allow an infant to trade, an action <sup>\*140</sup> would not lie against him for work done in course of it.<sup>b</sup> On the same principle, where an infant deposited a sum of money, under an agreement that he would become a partner with the defendant in trade, on a future day, and that in case he failed to fulfil the agreement, the sum in question should be forfeited to the defendant; it was held, that, having repudiated the contract, by refusing to become a partner at the prescribed period, he might recover back the deposit, in an action for money had and received.<sup>c</sup>

Where an infant rented a house, and exercised his calling therein as a barber; held, that it was properly left to the jury to decide whether it came within the term "necessaries;" *semble*, that there is no distinction between a trade carried on by a minor and his occupation in a manual employment, and that he is not liable for the rent of a house taken for either purpose.<sup>d</sup>

It is laid down as a general principle, that if an agreement be for the benefit of an infant at the time, it shall bind him.<sup>e</sup> (1) Contracts for the benefit of an infant. Where the defendant agreed to sell to the plaintiff (an infant) a certain quantity of potatoes, and the plaintiff paid 40*l.* under

<sup>a</sup> Per Bayley, J., *Thornton v. Illingworth*, 2 B. & C. 826. (9 Eng. C. L. 256.) See also *Lowe v. Griffiths*, 1 Hod. 30. *Whywall v. Champion*, Stra. 1083. *Whittingham v. Hill*, Cro. Jac. 494.

<sup>b</sup> *Dilk v. Keighley*, 2 Esp. 480. As an infant cannot trade, he cannot become a bankrupt. *O'Brien v. Currie*, 5 C. & P. 283. (14 Eng. C. L. 307.) *Ex parte Moule*, 4 Ves. 603. A fiat in bankruptcy against him is void, and not merely voidable. *Belton v. Hodges*, 9 Bing. 365. (23 Eng. C. L. 309.) But if an infant makes use of goods supplied to him in trade as necessaries for his family, he is liable for the amount. *Turberville v. Whitehouse*, 1 C. & P. 94. (11 Eng. C. L. 326.) 12 Price, 692, S. C.

<sup>c</sup> *Corpe v. Overton*, 10 Bing. 252. (25 Eng. C. L. 121.) Yet see *Wilson v. Kearse*, Peake, Add. Cas. 196, where Lord Kenyon held that an infant could not recover back a deposit on an agreement to purchase a public-house, upon his refusal to complete the agreement; and in *Drury v. Drury*, Wilmot's Notes, 177, Lord Mansfield said, that "if an infant pay money with his own hand, without a valuable consideration for it, he cannot get it back again." This decision was cited with approbation by Gibbs, C. J., in *Holmes v. Blogg*, 8 Taunt. 508. (4 Eng. C. L. 190.)

<sup>d</sup> *Lowe v. Griffiths*, 1 Hodges, 30.

<sup>e</sup> Per Lord Mansfield, in *Drury v. Drury*; recognised by Buller, J., in *Maddon v. White*, 2 T. R. 161, who says that all the modern cases have expressly held that an infant cannot avoid a lease which is for his own benefit. "The contract of an infant, if made for his benefit, according to the several principles of law is not void, but voidable only, at his election." Per Abbot, C. J., *R. v. Chillesford*, 4 B. & C. 100. (10 Eng. C. L. 280.)

(1) (*Nickersen v. Easton*, 12 Pick. 110. *Stone v. Dennison*, 13 Pick. 1. *Fridge v. The State*, 3 Gill & Johns, 103.)

the agreement, and carried away part of the potatoes, but was prevented by the defendant from carrying away the residue; held, that the plaintiff was entitled to recover for the breach of

\*141 \*this agreement. Lord Ellenborough, C. J.: "It is certainly for the benefit of infants, where they have given the fair value for any article of produce, that they should have the thing contracted for, and it is not necessary that they should wait until they come of age in order to bring the action. A hundred actions have been brought by infants for breaches of promise of marriage." Damper, J.: "In *Knight v. Stone*,<sup>a</sup> the court were of opinion that an infant might submit to a reference, because it might be to his benefit. And in *Holt v. Ward*<sup>b</sup> it is laid down, that where the contract may be for the benefit of the infant, or to his prejudice, the law so far protects him as to give him an opportunity of considering it, when he comes of age, and it is good or voidable at his election. But though the infant has this privilege, the party with whom he contracts has not, he is bound in all events."<sup>c</sup> (1)

Liability of infants for torts. It has been held that an action for money had and received would lie against an infant for money which he embezzled.<sup>d</sup> (2) The ground of that decision was, that the case was in substance an action *ex delicto*, though in form it was an action *ex contractu*, and in the former infancy could not be pleaded. Trover might have been brought, in which case infancy would be no defence; and as the object of the action for money had and received was the same, the same rule of law ought to apply. But where, on the other hand, the cause of action arises from a contract, on which the infant would not be liable, a party will not be permitted to treat the breach of contract as a *tort* and sue the infant in form *ex delicto*. If one deliver goods to an infant on a contract, knowing him to be an infant, the infant shall not be charged for them in trover and conversion; for the law will not permit a plaintiff, by changing the form of action, to vary the liability of the infant.<sup>e</sup> Therefore, where the plaintiff declared that he had delivered a mare to the defendant to be moderately ridden, and that the defendant maliciously intending, &c., wrongfully and injuriously rode the mare, so that she was damaged, &c.; the court held, that the

\*142 defendant might plead \*his infancy in bar, the action being founded on a contract. (3) Lord Kenyon, C. J.: "If it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection

<sup>a</sup> Sir William Jones, 164. But he is not bound by an agreement to refer a dispute to arbitration. Bac. Ab. Inf. (1) 3.

<sup>b</sup> 2 Stra. 937.

<sup>d</sup> *Bristow v. Eastman*, 1 Esp. 172.

<sup>c</sup> *Warwick v. Bruce*, 2 M. & S. 205.

<sup>e</sup> *Manby v. Scott*, 1 Sid. 129.

(1) (An infant may avoid even an executed contract for his labor, and recover on a *quantum meruit*. *Abell v. Warren*, 4 Verm. 149.)

(2) (Per Rogers, J., *Penrose v. Curren*, 3 Rawle, 453.)

(3) (*Penrose v. Curren*, 3 Rawle, 351. But see *Campbell v. Stokes*, 2 Wend. 137.)



which the law affords to infants. Lord Mansfield, indeed, frequently said, that this protection was to be used as a shield and not as a sword; therefore if an infant commit an assault or utter slander, God forbid he should not be answerable for it in a court of justice. But where an infant has made an improvident contract with a person who has been wicked enough to contract with him, such person cannot resort to a court of law to enforce such contract. And the words wrongfully, injuriously, and maliciously, introduced into this declaration, cannot vary this case.<sup>a</sup> An infant is not liable for a false and deceitful warranty of goods, or of his title thereto upon a sale by him.<sup>b</sup>

5.—*Liability of parents.*] It may not be amiss to consider briefly in this place, though not strictly applicable to this head, under what circumstances a parent will be liable for the contracts of his children. The principle to be collected from the decisions in this respect is, that a father is not responsible even for necessaries supplied to his child without his assent or authority express or implied; which is a question for the decision of the jury.<sup>c</sup>

In an action against a parent for the price of regimentals furnished to his son, Abbott, C. J., told the jury that it was a question for them to decide, whether the order for the regimentals was given by the assent and with the authority of the father. He said that, “a father would not be bound by the contract of his son, unless either an actual authority were proved, or circumstances appeared from which such an authority might be implied. Were it otherwise, a father who had an imprudent son might be prejudiced to an indefinite extent; and it was therefore necessary that some proof should be given that the order of the son was made by the authority of his father. \*The question therefore for the consideration of the jury was, whether under the circumstances of the particular case, there was sufficient to convince them that the defendant had invested his son with such authority. He had placed his son at the military college at Harlow, and paid his expenses whilst he remained there. His son, it appeared, then obtained a commission in the army; and having found his way to London, at a considerable distance from his father’s residence, had ordered regimentals and other articles suitable to an equipment for the East Indies. If it had appeared in evidence that the defendant had supplied his son with money for this purpose, or that he had ordered these articles to be furnished elsewhere; either of those circumstances might have rebutted the presumption of any authority from the defendant

A parent is not liable for necessaries supplied to his child without his authority.

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<sup>a</sup> Jennings v. Rundall, 8 T. R. 335.

<sup>b</sup> Green v. Greenbank, 2 Marsh, 485. (4 Eng. C. L. 375.)

<sup>c</sup> Rolfe v. Abbott 6 C. & P. 286. (24 Eng. C. L. 400.) Blackburne v. Mackay, 1 C. & P. 1. (11 Eng. C. L. 295.) Ch. Con. 118.

to order them from the plaintiff. Nothing, however, of this nature has been proved; and since the articles themselves were necessary, and suitable to that situation in which the defendant had placed him, it was for the jury to say, whether they were not satisfied that an authority had been given by the defendant." The jury found a verdict for the plaintiff.<sup>a</sup>

Not liable  
for the ed-  
ucation of  
his child.

A father is not under a *legal* obligation to educate his children, and cannot be made liable, if the circumstances absolutely negative his assent to the contract with the party instructing them.<sup>b</sup> It is doubtful whether at common law a father is

Nor for  
mainte-  
nance.

bound even to maintain his child.<sup>c</sup> Where a child was delivered to its grandmother on an undertaking that the father should not be called upon for its maintenance; it was held, that the father was not liable to pay for the support of the child, or for necessities supplied to it.<sup>d</sup>

When his  
authority  
may be  
implied.

If a man permits his children to live with his wife, he gives her an implied authority to purchase necessities for them.<sup>e</sup> So where the wife, in the absence of her husband, contracted for the board of his daughter, and after some time made a second contract with another person, who sued the husband on it, and it having appeared that the husband had paid for the \*first board, although he expressed his disapprobation of it; it was held, that the husband had thereby so far acknowledged the discretionary power of his wife to contract for this purpose, as to make him liable to the plaintiff on the second contract.<sup>f</sup> If a tradesman colludes with an infant and furnishes him with clothes to an extravagant degree, he cannot recover his demand from the father.<sup>g</sup> Nor will the father be liable on an implied contract for clothes furnished to his son, if he has allowed him a sufficiently reasonable sum for his expenses.<sup>h</sup>

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If children be left by their father under the protection of a servant, the latter has implied authority to provide medical assistance for the children on the father's credit if the children meet with an accident, though it occur through the carelessness of the servant.<sup>i</sup>

Where in an action for clothes supplied to the defendant's son, an infant, it appeared that the clothes were ordered by, and sent to the boy at school, who took them home during the holidays, and brought them back on his return to school; held, that there was sufficient evidence for the jury to infer, that the defendant had seen the clothes, and had authorised the son to order them.<sup>j</sup>

The father of a bastard child, if he has adopted it as his own,

<sup>a</sup> *Baker v. Keen*, 2 Stark. 501. (3 Eng. C. L. 449.)

<sup>b</sup> *Hodges v. Hodges*, Peake>Add. 79.

<sup>c</sup> *Urmston v. Newcomen*, 6 Nev. & M. 454.

<sup>d</sup> *Id.*

<sup>e</sup> *Rawlins v. Vandyke*, 3 Esp. 250.

<sup>f</sup> *Forsyth v. Milne*, Paley on Prin. and Agent. 120, n.

<sup>g</sup> *Simpson v. Robertson*, 1 Esp. 17.

<sup>h</sup> *Crantz v. Gill*, 2 Esp. 471.

<sup>i</sup> *Cooper v. Phillips*, 4 C. & P. 581. (19 Eng. C. L. 535.)

<sup>j</sup> *Law v. Wilkins*, 1 Nev. & Perr. 697. 1 W. W. & Dav. 235.



is liable for nursing and necessaries supplied to the child, When a though no order of bastardy has been made;<sup>a</sup> and if he con- father is sent to pay an annual sum for its support, he must continue to liable for do so, or provide for the child at his own expense, or give the necessa- most distinct notice of his intention to discontinue such annual ries sup- sum.<sup>b</sup> Where the father of a female illegitimate child, at one his illegit- time paid an annual sum for her support; and when she was imate child. sixteen years old, she was clothed and boarded by the plaintiff with the knowledge of the father; held that he was liable for such board and clothing, on an implied promise, as he did not express his dissent, or take her away.<sup>c</sup> But where the father had made various payments for the maintenance of his illegitimate child, and then refused to continue to support it, until the mother obtained an order of filiation; it was held, that the mother could not sue for the subsequent maintenance of the child.<sup>d</sup>

\*SECTION XVIII.

\*145

PAYMENT.

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1.—*How pleadable.*] PAYMENT might formerly be given in Payment evidence under the general issue, but by the rules H. T. 4 W. must be IV, it must be specially pleaded; unless the particulars of the specially plaintiff's demand admit all the payments and limit the claim pleaded. to the sum unpaid.<sup>e</sup> Payment, however, may be given in evidence in *reduction of damages*<sup>f</sup>; but not in bar to the action, under *non assumpsit*.<sup>g</sup>

Pleas of payment, and set off of a particular amount, are The plea not supported by proof of payment, or set off of a less amount; of pay- but the plea may be taken distributively and found, as to the ment may part not proved, for the plaintiff; and as to the part proved, for be taken the defendant; and if upon the finding of a plea of *nunquam* distribu- tively.

<sup>a</sup> Hesketh v. Gowing, 5 Esp. 131.  
<sup>b</sup> Cameron v. Baker, 1 C. & P. 268. (11 Eng. C. L. 388.)  
<sup>c</sup> Nichole v. Allen, 3 C. & P. 36. (14 Eng. C. L. 198.) Bankruptcy is no discharge of a promise to allow a weekly sum for the maintenance of an illegitimate child. Miller v. Whittenbury, 1 Campb. 428.  
<sup>d</sup> Furillio v. Crowther, 7 D. & R. 612. (16 Eng. C. L. 302.)  
<sup>e</sup> Per Parke, B., in Coates v. Stevens, 2 C. M. & R. 119.  
<sup>f</sup> Shirley v. Jacobs, 2 Bing. N. C. 88. (29 Eng. C. L. 266.) Liddiard v. Boucher, 7 C. & P. 1.  
<sup>g</sup> Milligan v. Thomas, 4 Dowl. 374.

*indebitatus*, it appears on the record that the plaintiff is not entitled to recover a larger sum than that which is covered by the proof given under the defendant's pleas, the defendant is entitled to judgment on the whole record.<sup>a</sup>

Payment  
to an au-  
thorised  
agent is  
sufficient.

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To an at-  
torney.

2.—*To whom made.*] Payment to an authorised agent in the ordinary course of business is binding on the principal, and his authority may be inferred from his relative situation in respect of the principal and from other circumstances. Thus in an action for goods sold, where the defence was payment, and it appeared that the defendant had paid the debt at the plaintiff's counting-house to a person sitting there in a part railed off, with account books near him, and apparently entrusted with the conduct of the business. Lord Tenterden, C. J., held, that this was \*good payment to the plaintiff, although the person to whom the money was paid had not, in fact, any authority to receive it.<sup>b</sup> Payment to an attorney employed by the plaintiff to obtain the debt, is as effectual as payment to the plaintiff himself,<sup>c</sup> or to the attorney on the record.<sup>d</sup> But payment to the attorney's clerk,<sup>e</sup> or to the attorney's agent<sup>f</sup> is not binding on the principal.

Payment by a debtor to a third person, in pursuance of an order given by the creditor, is equivalent to payment to the creditor himself.<sup>g</sup> Payment to an executor who has obtained a probate of a forged will, is an answer to an action brought against the debtor by the rightful administrator, on revocation of the probate.<sup>h</sup>

Payment  
by an at-  
torney.

Into a  
bank.

Payment by an attorney on behalf of his principal, who gave him his note for the amount so paid, is equivalent to payment by the principal himself, though the note be not paid; for the attorney might be considered his agent, for the purpose of making such payment.<sup>i</sup> Where money is paid into a bank on the joint account of persons not partners in trade, the bankers are not discharged by payment to one of those persons without the authority of the others.<sup>j</sup>

To an  
agent not  
authorised

An authority given to an agent to receive money, does not allow the debtor to set off a debt which the agent owes him, for if that were permitted, it would enable the agent to collude with the debtor to defraud the principal.<sup>k</sup> An authority given

<sup>a</sup> *Cousins v. Paddon*, 1 Gale, 305. 2 C. M. & R. 547.

<sup>b</sup> *Barrett v. Deere*, M. & M. 200. (22 Eng. C. L. 291.) See also *Owen v. Barrow*, 1 N. R. 101. *Coates v. Lewis*, 1 Campb. 444.

<sup>c</sup> *Coore v. Callaway*, 1 Esp. 115. *Powell v. Little*, 1 Bl. 8.

<sup>d</sup> Per Bayley, J., *Crozer v. Pilling*, 4 B. & C. 34. (10 Eng. C. L. 275.)

<sup>e</sup> Per Lord Kenyon, *Coore v. Callaway*, *supra*.

<sup>f</sup> *Yates v. Freckleton*, Doug. 623.

<sup>g</sup> *Hodgson v. Anderson*, 3 B. & C. 862. (10 Eng. C. L. 247.)

<sup>h</sup> *Allen v. Dundas*, 3 T. R. 125. See *Woolley v. Clark*, 5 B. & A. 744. (7 Eng. C. L. 249.)

<sup>i</sup> *Adams v. Dansey*, 6 Bing. 506. (19 Eng. C. L. 149.)

<sup>j</sup> *Innes v. Stephenson*, 1 M. & Rob. 145. See also *Stone v. Marsh*, R. & M. 364. (21 Eng. C. L. 457.)

<sup>k</sup> *Bartlett v. Pentland*, 10 B. & C. 760. (21 Eng. C. L. 163.)

to a commercial traveller to receive payment in *money* for goods sold in the country for his employers, does not empower him to receive payment in other goods.<sup>a</sup> Where a stakeholder paid a deposit to the apprentice of the party who made the deposit at the counting-house of \*the latter, it was considered not to operate as a payment to the master, it not being in the usual course of business.<sup>b</sup> \*147

In an action for sheep sold and delivered, the defendant pleaded a payment of 175*l.*; it was proved by *J. J.* that he received a sum of 175*l.* from the defendant's wife, and gave it to the plaintiff. Held, that evidence might be given that when the defendant's wife gave him the money she told *J. J.* to take it to the plaintiff for the sheep.<sup>c</sup> Evidence of payment.

3.—*Mode of payment.*] If money be sent in a letter by post, and be lost, the debtor is discharged, if the creditor directed it to be so transmitted; or if it was the usual course of business between the parties.<sup>d</sup> And it seems that a delivery of a letter to the bellman in the street, is equivalent to a delivery to the post office;<sup>e</sup> though in one instance it was held otherwise.<sup>f</sup> Sending money by post.

The acceptance of a check by a creditor operates as payment, until it has been presented and refused; and even if payment of it be refused, the refusal of it must be proved to have taken place before the action was brought.<sup>g</sup> Payment by a check

Payment by bills is *prima facie* an answer to a money demand, without showing that the bills were discharged; it is for the plaintiff to show that they were dishonored.<sup>h</sup> Where the defendant, who had ordered goods for ready money, paid for them by returning to the vendor's agent a bill accepted by the vendor, which had been due and dishonored before the goods were ordered; held, sufficient payment.<sup>i</sup> Where an agent gave his security, which was accepted by the creditor, who gave a receipt, and the principal in consequence thereof dealt differently with the agent; held, that the principal was discharged though the security failed.<sup>j</sup> Where the purchaser of goods \*gave the seller an order on his banker, for "a good bill on London," and the seller took a bill which was afterwards \*148 By bills.

<sup>a</sup> Howard v. Chapman, 4 C. & P. 508. (19 Eng. C. L. 499.)

<sup>b</sup> Saunderson v. Bell, 4 Tyr. 224. 2 C. & M. 304.

<sup>c</sup> Walter v. Lewis, 1 C. & P. 344.

<sup>d</sup> Warwicke v. Noakes, Peake, 67. Walter v. Haynes, R. & M. 149. (21 Eng. C. L. 402.)

<sup>e</sup> Park v. Alexander, 3 Moore & Scott, 789.

<sup>f</sup> Hawkins v. Rutt, Peake, 186.

<sup>g</sup> Pierce v. Davies, 1 M. & Rob. 365, per Patteson, J. And see Boswell v. Smith, 6 C. & P. 60. (25 Eng. C. L. 282.)

<sup>h</sup> Hebden v. Hartsink, 4 Esp. 46.

<sup>i</sup> Mayer v. Nias, 1 Bing. 311. (8 Eng. C. L. 230.)

<sup>j</sup> Wyatt v. the Marquis of Hertford, 3 East, 147. But if the defendant had sustained no prejudice by this mode of dealing between the creditor and the agent, he would not be discharged from the debt. Robinson v. Reed, 9 B. & C. 449. (17 Eng. C. L. 418.)

dishonored; held, that the seller was precluded from suing for the amount of the goods sold, for he ought to have taken care to get a good bill.<sup>a</sup>

Where a party elects to take a bill in preference to cash.

If a creditor refer a third person to his debtor for payment, intending the third person to take payment in money, and the latter instead of taking payment in money, takes payment in any other way, he does it at his peril; as where the purchaser of goods gave to the vendor an order on his banker for the price, and the latter offered to pay in cash, or by bill on a third person, and the vendor elected to take the latter; held, that he could not afterwards sue the purchaser for the price, though the bill was dishonored.<sup>b</sup>

When the bill is lost.

But where the seller had an order for payment on the agent of the purchaser, who offered to pay him in bank notes, but he preferred a check on his banker, which was dishonored; held, that the principal was not thereby discharged; for the check must be looked upon as that of the principal.<sup>c</sup>

Where the purchaser of goods gave the vendor a bill not due, accepted by two other persons, to the amount of the goods, and indorsed it in blank, and the vendor lost the bill before it was paid; held, that he could not sue the purchaser either on the bill or for the amount of the goods, as the latter might still be compelled to pay the amount of the bill to a *bona fide* holder.<sup>d</sup>

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A note not negotiable

If the seller of goods takes notes or bills for them, without agreeing to run the risk of the notes being paid, and the notes turn out to be worth nothing, this will not be considered as payment.<sup>e</sup> Where the defendant indorsed a promissory note, not negotiable, to the plaintiff in payment of goods, and the plaintiff neglected to present the note to the maker when due, it remained unpaid; held, that he might, notwithstanding, recover the price of the goods from the defendant, as he could not be considered as guilty of laches in not presenting a note, the payment of which he could not enforce.<sup>f</sup>

In *Gillard v. Wise*,<sup>g</sup> it was held, that where a party receives credit for a bill from the persons ultimately liable, that is tantamount to payment.<sup>h</sup> Where the defendant entered into a

<sup>a</sup> *Bolton v. Reichard*, 1 Esp. 106.

<sup>b</sup> *Smith v. Ferrand*, 7 B. & C. 19. (14 Eng. C. L. 6.) Unless a bill is taken by choice instead of cash, it is not equivalent to payment, per Parke, J., *Robinson v. Read*, 9 B. & C. 455. (17 Eng. C. L. 420.) If the master of a vessel is to get payment in the best way that he can, and has no power to get any thing but a bill, he must take that, but if he could get paid in any other mode, he should do so, otherwise he will be bound by taking a bill; per Bayley, J., *Strong v. Hart*, 6 B. & C. 161. (13 Eng. C. L. 132.) And see *Marsh v. Pedder*, 4 Campb. 257.

<sup>c</sup> *Everett v. Collins*, 2 Campb. 515.

<sup>d</sup> *Champion v. Terry*, 7 Moore, 130. 3 B. & B. 295. (7 Eng. C. L. 443.)

<sup>e</sup> *Owenson v. Morse*, 7 T. R. 64. But if the seller had agreed to take the notes as payment, and to run the risk of their being paid, that would be considered as payment, whether the notes had or had not been afterwards paid; per Lord Kenyon, C. J., *id.* See *Ward v. Evans*, *Ld. Raym.* 930.

<sup>f</sup> *Plimley v. Westley*, 1 Hodg. 324. 2 Bing. N. C. 249. (29 Eng. C. L. 322.)

<sup>g</sup> 5 B. & C. 134. (11 Eng. C. L. 177.)

<sup>h</sup> Per Patteson, J., *Atkins v. Owen*, 4 Nev. & M. 125.

composition with his creditors, of whom the plaintiff was one, Bills are and it was agreed, that several bills of exchange, which had not to be previously been indorsed by the defendant to the plaintiff, considered should be considered as part payment of the plaintiff's proportion of the composition; held, that one of the bills having been dishonored, the defendant was liable on the indorsement; for, ed. that the bills were not to be considered as absolute payment, unless they were paid when at maturity.<sup>a</sup>

4.—*Appropriation of payments.*] The general rule is, Of the that a party who pays money has a right to apply that pay- right to di- ment as he thinks fit. If there are several debts due from him rect the he has a right to say to which of those debts the payment shall applica- be applied. If he does not make a specific application at the tion of time of payment, then the right of application generally de- payments. velopes on the party who receives the money.<sup>b</sup> If at the time the debtor makes the payment, he declares that it is specifically made in liquidation of a particular account, or if the circumstances show, or raise an inference that such was his intention, the creditor is bound thereby, and cannot apply it to another demand.<sup>c</sup> But if no such declaration be made at the time of payment, or if there be no circumstance in the case, from which the intention of the debtor to apply the payment to a particular account can be inferred, \*the creditor may appropriate it \*150 to which account he pleases.<sup>d</sup>(1)

Where a person has two demands, one recognised by law, Where the other arising on a matter forbidden by law, and an unap- there are propriated payment is made to him, the law will afterwards legal and appropriate it to the demand which it acknowledges, and not illegal de- to the demand which it prohibits; as where distinct sums of mands. money were due, one for goods sold, the other for money lent on a usurious contract, and a payment was made which was

<sup>a</sup> *Constable v. Andrews*, 2 C. & M. 293.

<sup>b</sup> Per Bayley, J., *Simson v. Ingham*, 2 B. & C. 72. (9 Eng. C. L. 28.)

<sup>c</sup> *Shaw v. Picton*, 4 B. & C. 715. (10 Eng. C. L. 443.) *Peters v. Anderson*, 5 Taunt. 596. (1 Eng. C. L. 201.) *Newmarsh v. Clay*, 14 East, 239.

<sup>d</sup> *Hall v. Wood*, 14 East, n. *Biggs v. Dwight*, 1 M. & R. 308. *Kirby v. the Duke of Marlborough*, 2 M. & S. 18. *Peters v. Anderson*, 5 Taunt. 596. (1 Eng. C. L. 201.) *Campbell v. Hodgson*, Gow. 74. (5 Eng. C. L. 468.) Per Taunton, J., *Philpot v. Jones*, 4 Nev. & M. 16. Per Bayley, J., *Bodenham v. Purchas*, 2 B. & A. 45. And the creditor has a right to make an application of the payment at any time before the matter comes to the consideration of a jury. Per Taunton, J., *Philpot v. Jones*, 4 Nev. & M. 16.

(1) (*Martin v. Draher*, 5 Watts, 548. This doctrine of appropriation is applicable only to voluntary payments: for where there were several notes included in one judgment, and a part raised by execution, it was held that it must be applied to the notes *pro rata*. *Blackstone Bank v. Hill*, 10 Pick. 129. Though the application be not expressly directed by the debtor, it may be inferred from circumstances. *Mitchell v. Dall*, 4 Gill. & Johna. 361. A reasonable time is given to the payee. *Briggs v. Williams*, 2 Verm. 283. It is too late for the debtor to do it after a controversy has arisen. *Backhouse v. Patton*, 5 Peters, 160. If neither party elect, the court will direct the payment to be applied on those debts which are not well secured, in preference to those which are. *Briggs v. Williams*, *supra*. But see *Backhouse v. Patton*, *supra*.)

not specifically appropriated to either debt by debtor or creditor; it was held, that the law would afterwards appropriate such payment to the debt for goods sold.<sup>a</sup> Where a demand consisted of two items, one of which was for spirituous liquors, for which the plaintiff was disabled from recovering by 24 Geo. II, c. 40, s. 12, and the defendant made a payment in account, without any specific appropriation of it, the jury found that the defendant had applied the sum paid in liquidation of the claim for spirits; and the court refused to disturb the verdict, as there was no provision in the act forbidding *the application of a payment* to a demand of this sort.<sup>b</sup> Where there is a running account between a banker and his customer, and part of the balance due to the former is upon a legal and part on an illegal demand, and money is paid generally by the customer, it may be appropriated to the satisfaction of the legal demands.<sup>c</sup>

**Legal and equitable demands.** The creditor may apply the payment in discharge of a prior and purely equitable demand, and sue for a subsequent legal debt.<sup>d</sup> But a general payment must be applied to a prior legal, and not to a subsequent equitable demand.<sup>e</sup>

**\*151 Demands in different rights.** \*Where one account is with the debtor as *executor*, and the other in his own right, the law will apply the payment to the account in his own right, and will not allow the creditor to appropriate it to the other demand; for there might not be assets to meet it.<sup>f</sup>

**Partnership demands.** If a partner in a firm owes a private debt to *A.*, who is also a creditor of the firm, and pays money of the firm generally on account, *A.* cannot apply it to the private debt.<sup>g</sup> But where accounts are treated as one entire account by all the parties, payments made upon such accounts are considered as payments in discharge of the earlier items.<sup>h</sup> Where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firm in one entire account, then payments made from time to time by the surviving partners must be applied to the old debt.<sup>i</sup> *W.* and *T.*, partners, were indebted to the plaintiff, and after the dissolution of the partnership, *T.* became indebted on his sepa-

<sup>a</sup> *Wright v. Laing*, 3 B. & C. 165. (10 Eng. C. L. 44.)

<sup>b</sup> *Philpot v. Jones*, 4 Nev. and M. 14. See also *Cruikshank v. Rose*, 1 M. & Rob. 100, S. P.

<sup>c</sup> *Ex parte Randleson*, 2 Dea. & Ch. 534.

<sup>d</sup> *Bosanquet v. Wray*, 6 Taunt. 597. (1 Eng. C. L. 495.)

<sup>e</sup> *Goddard v. Hodges*, 1 C. & M. 33. See *Birch v. Tebbutt*, 2 Stark. 74. (3 Eng. C. L. 252.)

<sup>f</sup> *Goddard v. Cox*, Stra. 1194. If there be a debt due from the wife *dum sola*, and also from the defendant on his own account, the plaintiff may apply payment to either account. *id.*

<sup>g</sup> *Thompson v. Brown*, M. & M. 40. (22 Eng. C. L. 242.)

<sup>h</sup> Per Bayley, J., *Bodenham v. Purchas*, 2 B. & A. 45, 6. *Clayton's Case*, 1 Meriv. 572.

<sup>i</sup> *Simson v. Ingram*, 2 B. & C. 74. (9 Eng. C. L. 28.) Per Bayley, J.



rate account to the plaintiff; held, that in the absence of any specific appropriation by either party, payments made by *T.* after the dissolution must go in reduction of the entire account, and consequently must discharge the earlier items.<sup>a</sup>

Where *A.* and *B.* entered into a bond to guarantee any sums not exceeding 3,000*l.*, which the plaintiff might subsequently advance to *A.*; held, that payments made generally to the plaintiff on account of *A.*, might be applied by them in liquidation of a balance existing against *A.*, before the execution of the bond, and that *B.* could not insist on such payments being applied in exoneration of his liability on the bond, although at the time of his entering into it the plaintiffs did not give him notice that any balance was then existing against *A.*; the court <sup>where there is a guarantee.</sup> *said*, that *B.* should have inquired at the time when he executed the bond, whether the account stood clear.<sup>b</sup> \*152

But where security had been given by a surety for goods to be supplied to his principal, and not in respect of a previously existing debt, and goods were subsequently supplied, and payments were from time to time made by the principal, in respect of some of which discount was allowed for prompt payment, it was inferred in favor of the surety, that all these payments were intended to be in liquidation of the latter account.<sup>c</sup>

SECTION XIX.

SET OFF.<sup>d</sup>

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1.—*What debts may be set off.*] The 2 Geo. II, c. 22, s.

<sup>a</sup> *Smith v. Wigley*, 1 M. & Scott, 174.  
<sup>b</sup> *Kirby v. the Duke of Marlborough*, 2 M. & S. 18.  
<sup>c</sup> *Marryatts v. White*, 2 Stark. 101. (3 Eng. C. L. 265.) See *Williams v. Rawlinson*, 3 Bing. 76. (11 Eng. C. L. 34.) *Plomer v. Long*, 1 Stark. 153. (2 Eng. C. L. 334.) *A.* being indebted to *B.*, on a bond (or mortgage,) and also for goods sold and delivered, money paid by *A.* generally on account, shall be taken to have been paid in discharge of the bond or mortgage, because it carries interest. 2 Brownlow, 107. *Heyward v. Lomax*, 1 Ver. 24. Anon. 12 Mod. 559. *A.* and *B.* are indebted by bond to *C.*, to whom *B.* is also indebted on simple contract. An account is stated between *B.* and *C.*, embracing both debts, and *B.* makes a bill of sale to *C.* in satisfaction of the whole debt. The money arising from the bill of sale shall be considered as paid on the footing of the preceding account, and applied in discharge of both debts in proportion. *Perris v. Roberts*, 1 Ver. 34. 1 Chan. Cas. 84. *Styart v. Rowland*, 1 Show, 216. *Vide* 4 Nev. & M. 16, n.  
<sup>d</sup> At common law, where there were cross demands or mutual debts, originating in different transactions, the defendant could not set off his demand against that of the plaintiff; his only remedy was to bring a cross action, or resort to a court of equity.



The sta-  
tutes.

\*153

13, made perpetual by the statute 8 Geo. II, c. 24, s. 4, enacts, that "where there are mutual debts between the plaintiff and the defendant, or if either party sue, or \*be sued, as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set off against the other; and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of pleading the general issue, where any such debt of the plaintiff, his testator, or intestate, is intended to be insisted upon in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence on such general issue."

The statute 8 Geo. II, c. 24, s. 5, declares, that by virtue of the preceding clause, mutual debts may be set off against each other, either by being pleaded in bar, or given in evidence on the general issue, though such debts be of a different nature; but in case either of such debts accrues by reason of a penalty contained in any bond or specially, the debt intended to be set off shall be pleaded in bar, in which plea shall be shown, how much is justly due on either side, and the plaintiff shall have judgment for what shall appear to be justly due.

Set off not  
compul-  
sory.

These statutes were passed for the benefit of defendants; it is therefore not compulsory on a defendant to avail himself of his right of set off; he may waive such right, and bring a cross action for his claim.<sup>a</sup>

<sup>a</sup> *Brown v. Pigeon*, 2 Camp. 594. But the plaintiff may have the amount of the defendant's demand indorsed on the postea, and take the balance only, and such special indorsement would be a ground for the court to stay proceedings in case of a cross action. *Laing v. Chatham*, 1 Campb. 252.

If the plaintiff arrests the defendant for the whole of his side of the account, without deducting what is due on the other side, he will be liable to an action for an arrest without probable cause. *Austin v. Debnam*, 3 B. & C. 139. (10 Eng. C. L. 37.)

But if the defendant's claim be connected with that of the plaintiff, or accrues from the same transaction which forms the foundation of the action, he will be allowed to deduct it without pleading, or giving notice of a set off. See Montague on the law of set off, and the cases there cited.

As where it was agreed between the master and servant, that the servant should pay out of his wages for all his master's goods lost through his negligence; the value of the goods so lost, may, under the general issue, be deducted from the amount of the wages. *De Loir v. Bristow*, 4 Campb. 134. So in an action for dyeing goods, the defendant may show, under the general issue, that it is the custom in his trade to deduct the amount of injury sustained in the process of dyeing, from the charge for dyeing. *Bamford v. Harris*, 1 Stark. 343. (2 Eng. C. L. 419.) So where a landlord directed his tenant to pay certain rates on his (the plaintiff's) account, and set them off against the rent; held, that the tenant might deduct the amount of such rates without plea or notice in an action by the landlord for the rent. *Roper v. Bumford*, 3 Taunt. 76. Where *A.* took possession of premises on the 2d of June, and a sum of money became due for ground-rent on the 24th for the quarter ending on that day, which *A.* paid; held, in an action for mesne profits against *A.*, that he was entitled to deduct the money so paid from the damages. *Doe v. Hare*, 2 C. & M. 145. So an agent employed to recover a sum of money, may on the general issue deduct a fair allowance for his services in that respect. *Dale v. Sallet*, 4 Burr. 21, 33.

\*Notwithstanding the provisions of the preceding statutes, it must be has been determined that, since the new rules, a set off must specially be specially pleaded; and that a notice thereof will not enable the defendant to give evidence of it, under *non assumpsit*.<sup>a</sup>

2.—*Mutual debts*.] The demand proposed to be set off must constitute a debt for which an action *ex contractu* might be maintained by the defendant against the plaintiff, and if the claim of either party consists of uncertain or unliquidated damages, a set off is not allowed.<sup>b(1)</sup>

Therefore, in an action for not accepting a bill of exchange, commenced before the expiration of the period the bill was to run, the defendant cannot set off a debt for goods sold; for the plaintiff's demand is for unliquidated damages.<sup>c</sup> So, in an action for not indemnifying the plaintiff against certain accommodation acceptances, whereby he was obliged to pay the bills, together with interest and expenses; it was held, that the defendant could not plead a set off, as the contract declared upon might entitle the plaintiff to special damages.<sup>d</sup> So, where the defendant's demand was for a loss sustained by the plaintiff's neglecting to insure.<sup>e</sup> So a sum due on a guarantee cannot be set off.<sup>f</sup>

Where the demand on either side is unliquidated, a set off is not allowed.

\*A debt, not due when the action is commenced, cannot be set off.<sup>g</sup> Therefore, a plea stating that the plaintiff was indebted to the defendant at the time the plaintiff declared, or at the time of the plea pleaded, will be bad on general demurrer.<sup>h</sup> So the debt must be due at the time of plea pleaded: therefore, a plea of set off on a bill of exchange, payable to the order of the defendant, and accepted by the plaintiff, is not supported by evidence of a bill answering to the description in the plea, which at the time of action brought was in the hands of a third party, though before the plea pleaded, it had got back into the hands of the defendant.<sup>i</sup>

\*155 The debt to be set off must be due when the action is brought.

A debt barred by the statute of limitations cannot be set off, and if pleaded, the plaintiff may reply the statute.<sup>j</sup> Set off is not allowed in an action on a policy of insurance on a ship or

Judgment debts.

<sup>a</sup> *Graham v. Partridge*, 1 M. & W. 395. *Fidgett v. Penny*, 1 C. M. & R. 110.

<sup>b</sup> But see *Gibson v. Bell*, *post*. 163. A set off cannot be pleaded in actions *ex delicto*, such as tort, trespass, detinue, case or replevin, B. N. P. 181. *Sapford v. Fletcher*, 4 T. R. 511. *Mont. on set off*, 13.

<sup>c</sup> *Hutchinson v. Reid*, 3 Campb. 329.

<sup>d</sup> *Hardcastle v. Netherwood*, 5 B. & A. 93. (7 Eng. C. L. 37.) See also *Cooper v. Robinson*, 2 Chitt. 161. (18 Eng. C. L. 284.) *Auber v. Lewis*, Man. Dig. 2d ed. 251.

<sup>e</sup> *Gillett v. Mawman*, 1 Taunt. 137.

<sup>f</sup> *Crawford v. Stirling*, 4 Esp. 207. *Mosley v. Inglis*, MS. C. P. M. T. 1837. 4 Bing. N. C.

<sup>g</sup> *Rogerson v. Ladbroke*, 1 Bing. 93. (8 Eng. C. L. 260.)

<sup>h</sup> *Evans v. Prosser*, 3 T. R. 186.

<sup>i</sup> *Braithwaite v. Carman*, 4 N. & M. 654. B. N. P. 180.

(1) (See *Bayne v. Gaylord*, 3 Watts, 301. *Butts v. Collins*, 13 Wend. 139.)

goods averring a total loss;<sup>a</sup> or in assumpsit against an agent for not accounting.<sup>b</sup>

Judgment debts.

The defendant cannot set off a judgment debt on which he has charged the plaintiff in execution. The plaintiff may reply such taking in execution.<sup>c</sup> But in such a case the court, on application, will allow the defendant to enter satisfaction on the judgment-roll in the action against him, on his acknowledging satisfaction for the same account, upon the judgment obtained by him.<sup>d</sup> The assignee of a bond debt cannot set it off.<sup>e</sup> Nor can judgments be set off, even though they arise from the same award, without satisfying the attorney's lien.<sup>f</sup> A judgment may be pleaded by way of set off, though a writ of error be pending thereon.<sup>g</sup>(1)

Attorney's bill.

A set off may be pleaded to an action for the arrears of an annuity.<sup>h</sup> An attorney may set off his bill though it was not

\*156

delivered a month before the commencement of the action; but it ought to be delivered a reasonable time before the trial, so as to afford the plaintiff an opportunity of having it taxed.<sup>i</sup> A

Goods bargained and sold.

manufacturer who refuses to deliver goods sold to the plaintiff without payment, may set off the amount, as goods bargained and sold.<sup>j</sup>

When a remittitur may be entered.

Where, in an action on a promissory note of 30*l.*, the plaintiff took a verdict for the whole sum; the defendant had at the same sittings an action against the plaintiff for 11*l.*, to which there was a notice to set off the note of hand; the court held, that notwithstanding the verdict, the note of hand might be set off, and that a *remittitur* might be entered on the first record as to so much.<sup>k</sup> Where the plaintiff declared specially in assumpsit for not accounting, with a count for money had and received, and the defendant pleaded the general issue to the whole declaration, and a set off to the general count; held, that though the plaintiff might recover his whole demand on either count, he should not be permitted to rely on the special count, in order to deprive the defendant of the benefit of his set off.<sup>l</sup>

Where a penalty may be set off.

By articles of agreement for repairing a warehouse for a fixed price, it was stipulated, that in the event of the work not being completed in three months, the builder should forfeit to his employer a penalty of 5*l.* every week, to be deducted from the amount due at the completion of the work; held, in an action

<sup>a</sup> Grant v. The Royal Exchange Assurance, 5 M. & S. 439.

<sup>b</sup> Birch v. Depeyster, 4 Camp. 385.

<sup>c</sup> Taylor v. Waters, 5 M. & S. 103.

<sup>d</sup> Peacock v. Jeffery, 1 Taunt. 426. Simpson v. Hanley, 1 M. & S. 696.

<sup>e</sup> Wake v. Tinkler, 16 East. 36.

<sup>f</sup> Domett v. Helyer, 1 Dowl. 540. See George v. Elton, 1 Hodges, 63. 1 Bing. N. C. 513. (27 Eng. C. L. 477.)

<sup>g</sup> Reynolds v. Beerling, 3 T. R. 188, n.

<sup>h</sup> Collins v. Collins, 2 Burr. 820. But it cannot be pleaded to an action on a bail bond, unless it is assigned by the sheriff. Hutchinson v. Sturges, 1 Willes, 261.

<sup>i</sup> Bulman v. Birkett, 1 Esp. 449.

<sup>j</sup> Dunmore v. Taylor, Peake, 41.

<sup>k</sup> Baskerville v. Brown, B. N. P. 180. 2 Burr. 1229.

<sup>l</sup> Birch v. Depeyster, 4 Camp. 387.

(1) (*The People v. New York Common Pleas*, 13 Wend. 649.)

brought for *extra work*, that the employer was entitled to set off the penalty, and that he had a double remedy, either to deduct it or recover it.<sup>a</sup>

3.—*Demands due in the same right.*] A debt which accrued in the lifetime of the testator cannot be set off against a debt which accrues to the executor after the death of the testator.<sup>b</sup>(1) To an action by the executors of an underwriter, against an insurance broker, for premiums which accrued \*due to the testator, the defendant cannot set off returns which became due after the testator's death.<sup>c</sup> Where the plaintiff declared, as executor, for a debt which accrued after the death of the testator, it was held, that the defendant could not set off a debt due from the testator.<sup>d</sup>

The demands must be due in the same right \*157

Executor and administrator.

On the same principle, the directors or trustees of any company cannot set off a debt due to them as individuals, against a demand upon them in their corporate capacity, for stock.<sup>e</sup> A trustee of a bill of exchange cannot set it off in an action against him in his own right.<sup>f</sup> A debt from the sheriff cannot be set off to an action commenced by him on the bail-bond; but if the bail-bond be assigned, a debt due from the assignees may be set off to an action commenced by them thereon.<sup>g</sup> In an action by a trustee for the benefit of the *cestui que* trust, the defendant cannot set off a debt due to him from the *cestui que* trust (it being an equitable demand.)<sup>h</sup> So costs in Chancery cannot be set off against the costs of a rule of the Court of King's Bench.<sup>i</sup>

Trustees.

Bail-bond.

In an action by two persons, the defendant cannot set off a debt due to him from one of the plaintiffs, nor can one of several defendants set off a debt due to him alone from the plaintiff.<sup>j</sup> But a debt on a joint and several bond may be set off to an action brought by only one of the obligors.<sup>k</sup>(2)

Several plaintiffs or defendants.

If business be carried on in the name of only one person, who is the ostensible proprietor, and an action be brought in

Partners.

<sup>a</sup> Duckworth v. Alison, 1 M. & W. 412.

<sup>b</sup> Shipman v. Thompson, B. N. P. 180. Ridout v. Brough, Cowp. 133. Willes, 103.

<sup>c</sup> Houstoun v. Robertson, 6 Taunt. 448. (1 Eng. C. L. 447.) Underwood v. Robertson, 4 Campb. 342.

<sup>d</sup> Kilvington v. Stevenson, Willes, 264. n.

<sup>e</sup> Gibson v. Hudson's Bay Co., 1 Stra. 639.

<sup>f</sup> Fair v. M'Iver, 16 East, 130.

<sup>g</sup> Hutchinson v. Sturges, Willes, 261.

<sup>h</sup> Tucker v. Tucker, 4 B. & Ad. 745. (24 Eng. C. L. 151.) In this case the court denied the authority of Bottimley v. Brooke, 1 T. R. 621, and Rudge v. Birch, cited *id.*

<sup>i</sup> Wenham v. Fowle, 2 Dowl. 444.

<sup>j</sup> Chitt. on Contracts, 664. Unless there be an agreement that it be allowed. Kinnersley v. Hossack, 2 Taunt. 170.

<sup>k</sup> Fletcher v. Dyke, 2 T. R. 32.

(1) (See *Crist v. Brindle*, 2 Rawle, 121. An executor cannot, at law or in equity, set off a demand purchased by him after the death of the testator, against a debt due by the estate to the person against whom he held the demand so purchased. *Mead v. Merritt*, 2 Paige, 402.)

(2) (*Warner v. Barker*, 3 Wend. 400. *Ladeu v. Hart*, 4 Wend. 583.)

the name of such proprietor and a dormant partner, the defendant may set off a debt due from the ostensible proprietor, if he was ignorant of the partnership at the time that he contracted such debt;<sup>a</sup> and a debt due to the defendant, as surviving \*partner may be set off against a debt due from him in his private character.<sup>b</sup> In an action by a surviving partner for his separate debt, the defendant may set off a debt due on the partnership account, for he might sue the plaintiff for such debt.<sup>c</sup> Where the defendant gave a note to his bankers, on account of a debt due to them, and they indorsed the note to another firm, consisting of some of the partners of the banking house; held, that in an action by the firm on the note, the defendant might set off a debt due to him from the bankers.<sup>d</sup>

**Principal and agent.** A debt arising upon the contract of an agent who deals as principal, may be set off against any demand between the agent and the debtor. The debts between the agent and debtor may respectively be set off against each other; and the debtor may set off a debt to him from the agent to a demand by the principal.<sup>e</sup> In an action by an agent, who deals as principal, the defendant cannot set off a debt due to him from the principal.<sup>f</sup>

**Factor.** Where a *factor*, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents and purposes, as the principal, and though the real principal may appear and bring an action upon the contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor, in answer to the demand of the principal.<sup>g</sup>

Where a factor sold goods to *A.*, and made out the invoice in his own name, but at the same time disclosed that they belonged to a principal in London; and it appeared that the custom of trade was for the factor to sell in his own name when he was under advances to his principal, as he was in the present instance; held, that *A.* was entitled to set off a debt due from the factor, in an action brought against him by the principal for the price of the goods.<sup>h</sup>

**Broker.** But the principle which governs dealings with factors does not apply in dealings with brokers; for as goods are consigned to the former, he has not only the possession of them, but also

<sup>a</sup> *Stacy v. Decy*, 2 Esp. 267. 7 T. R. 359, n. S. O.

<sup>b</sup> *Slipper v. Stidstone*, 5 T. R. 493.

<sup>c</sup> *French v. Andrade*, 6. T. R. 582.

<sup>d</sup> *Puller v. Roe*, Peake, 197.

<sup>e</sup> See Mont. on the law of set off, 19, and the cases there cited.

<sup>f</sup> Per Lord Mansfield, in *Drinkwater v. Goodwin*, Cowp. 251.

<sup>g</sup> Per Lord Mansfield, in *Rabone v. Williams*, cited in *George v. Claggett*, 7. T. R. 359, n. This dictum was acted upon in the latter and several other cases. But if the vendee has notice, before the contract is completed, that the goods belong to another party, and that the seller is an agent only, he cannot set off a debt due to him from the seller, in an action by the principal for the value of the goods, as it is not a case of mutual credit. *Moore v. Clementson*, 2 Campb. 22.

<sup>h</sup> *Warner v. M'Ray or Kay*, 2 Gale, 86. 1 Mees. & Wels. 591.



a special property in them, and a general lien upon them; when, therefore, he sells in his own name, it is within the scope \*of his authority, and it is right that the principal should be bound by the consequence of such sale. The case of a broker is different, he has not the the possession of the goods, and so the vendee cannot be deceived by that circumstance, and besides, employing a person to sell goods as, a broker does not authorise him to sell in his own name. Therefore, where a broker sold goods to the defendants in his own name; in an action by the principal for the price of the goods it was held that the defendants could not set off a debt due to them from the broker.<sup>a</sup> \*159

In an action by a husband for his own debt, he is not allowed to set off a debt due to him in right of his wife.<sup>b</sup> A debt due from the wife, *dum sola*, cannot be set off in an action by the husband alone; unless he makes himself individually liable, so that the wife would not be a necessary party to an action for the recovery of it.<sup>c</sup> So where a note was made payable to a married woman, and the husband sued on it in his own name only, it was held, that the defendant could not set off a debt due to him from the wife *dum sola*, but he might set off such debt if the action had been brought in the name of the husband and wife.<sup>d</sup> Husband and wife.

4.—*When allowed in bankruptcy.*] The statute 6 Geo. IV, c. 16, s. 50, enacts, that where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the amount between them; and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to, or the debt contracted by him; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made proveable against the estate of the bankrupt, may also be set off in manner aforesaid against such \*estate; provided that the person claiming the benefit of such set off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed. Set off in bankruptcy. \*160

Assumpsit by the assignees of *R.* a bankrupt, on a promissory note drawn on the defendant, payable to *G.* or order, and by him indorsed to the bankrupt before the bankruptcy. It appeared, that, in October, 1825, *G.* got the bill discounted by the bankrupt, and took in part payment a bill accepted by the bankrupt, payable to the order of *G.*, who indorsed it to the defendant, who got it discounted by *H.*, who was the holder Mutual credit.

<sup>a</sup> Baring v. Corrie, 2 B. A. 137.

<sup>b</sup> Paynter v. Walker, B. N. P. 179.

<sup>c</sup> Wood v. Akers, 2 Esp. 594.

<sup>d</sup> Burrough v. Moss, 10 B. & C. 558. (21 Eng. C. L. 128.) 5 M. & R. 296.

when it became due. A commission of bankrupt issued against *R.* on the 23d of December, and the bill became due on the 24th, when it was presented and dishonored. On the 26th *H.* received the amount from the defendant, and returned the bill to him; held, that he had a right to set off the bill against the action by the assignees on the promissory note: for there were mutual debts between him and the bankrupt, and they had their origin in a *mutual credit* before the bankruptcy. He was, therefore, within the words and the spirit of the act.<sup>a</sup> After the bankruptcy of *A.* and before his certificate, *B.*, one of his creditors, purchased goods from him. In an action brought by *A.* after he had obtained his certificate for the price of the goods, the old debt cannot be set off, being barred by the certificate.<sup>b</sup>

An unliquidated demand capable of being reduced to a certainty may be set off.

In an action by the assignees of a bankrupt for not accepting a bill of exchange pursuant to an agreement entered into by the defendant with the bankrupt on balancing accounts, no special damage being alleged in the declaration, the court held that the defendant might set off a debt due to him from the bankrupt before the bankruptcy, for as no special damage was incurred, the demand of the plaintiffs, though unliquidated at the moment, was capable of being reduced to a certainty by a simple calculation; viz. the amount for which the bill was drawn, together with interest due upon it, if the time of payment was passed; or the amount of the bill *minus* the discount, if the bill was not then due.<sup>c</sup>

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\*4.—*Pleadings.*] A set off, we have seen,<sup>d</sup> must be specially pleaded. Where there are cross demands and the defendant pleads a set off, the plaintiff is not bound to prove the whole of his demand, in the first instance, but may prove only the balance which he claims; and after the defendant has proved his set off, the plaintiff may prove other parts of his account to meet it.<sup>e</sup>

A plea of set off may be taken distributively

A plea of set off of a particular amount is not supported by a proof of a set off of a less amount; but the plea may be taken distributively, and found as to the part not proved for the plaintiff, and as to the part proved for the defendant: and if it appears on the record that the plaintiff is not entitled to recover a larger sum than that which is covered by the proof given under the defendant's pleas, the defendant is entitled to judgment on the whole record.<sup>f</sup> If the plaintiff re-

<sup>a</sup> *Collins v. Jones*, 10 B. & C. 777. (21 Eng. C. L. 169.)

<sup>b</sup> *Hayllar v. Sherwood*, 2 Nev. & M. 401. (28 Eng. C. L. 364.)

<sup>c</sup> *Gibson v. Bell*, 1 Hodges, 136. 1 Bing. N. C. 743. (27 Eng. C. L. 562.) See *Rose v. Sims*, 1 B. & Ad. 526, (20 Eng. C. L. 437,) where it was held, that a contract to indorse a bill of exchange was not a subject of mutual credit, so as to admit of a set off, as the damages were unliquidated. "For an *indorsement* would not necessarily have terminated in a *debt*, as the acceptor would have been the debtor, and the indorser a guarantee only." Per Tindal, C. J., 1 Hodges, 143.

<sup>d</sup> *Ante*, 154.

<sup>e</sup> *Williams v. Davies*, 1 C. & M. 464.

<sup>f</sup> *Cousins v. Paddon*, 1 Gale, 305. 2 C. M. & R. 547. 5 Tyr. 535.



plies *nunquam indebitatus* to a plea of set off, and the defendant proves his plea, the plaintiff will not be allowed under such replication to show that the sum proved, or even any part of it, has been paid; it being once proved that the plaintiff was indebted, the issue must be found for the defendant. But if the plaintiff replies *nil debet*, (as he may do, for the new rules do not apply to replications,) he may give evidence of payment.<sup>a</sup>

A plea of set off is not divisible; if pleaded to the whole declaration it admits something to be due on each count, and if the defendant fails in proving a demand equal to the whole of the plaintiff's claim, he will not be entitled to a verdict on any of the counts.<sup>b</sup>

## SECTION XX.

### TENDER.

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1.—*When a tender is available.*] A TENDER is a good defence in an action of assumpsit or debt, where the demand is of <sup>a</sup>a pecuniary nature, and certain in its amount, or capable of being reduced to a certainty; but it is not available in actions for *unliquidated* damages for a breach of contract.<sup>c</sup> “In strictness, a plea of tender is applicable only to cases where the party pleading it has never been guilty of any breach of his contract.”<sup>d</sup> Where the acceptor of a bill of exchange pleaded a tender, *after* the *bill* became due, in an action by the indorsee; the court held, on the authority of *Hume v. Peploe*, that the plea was bad; but, said Lord Abinger, if when the bill became due, the acceptor went to the house of the holder for the purpose of paying it, and not being able to find him, afterwards met him and made a tender, it would be unjust not to allow him to plead a tender.<sup>e</sup> It has been decided that such a plea is good to a count on a *quantum meruit*;<sup>f</sup>

<sup>a</sup> *Brown v. Daubeney*, 4 Dowl. 565. 1 H. & W. 646. Per Patteson, J., in the bail court.

<sup>b</sup> *Moore v. Butlin*, Q. B. M. T. 1837.

<sup>c</sup> *Giles v. Hartis*, 1 Lord Raym. 254.

<sup>d</sup> Per Lord Ellenborough, C. J., in *Hume v. Peploe*, 8 East, 170. But the drawer of a bill has a reasonable time after the dishonor to tender the amount, without interest. *Walker v. Barnes*, 5 Taunt. 240. (1 Eng. C. L. 91.)

<sup>e</sup> *Poole v. Crompton*, Mss. Ex. H. T. 1837, 2 M. & W.

<sup>f</sup> *Johnson v. Lancaster*, 1 Stra. 576. But in *Giles v. Hartis*, *supra*, Holt, C. J., said, “a man cannot plead tender in a *quantum meruit*.” And in *Searle v. Barrett*,

and to a bare covenant for the payment of money.<sup>a</sup> But in assumpsit by a landlord against a tenant for a breach of a contract to keep in repair, the court held, that a plea of tender would be bad; it being an action for unliquidated damages.<sup>b</sup>

At what  
time a ten-  
der must  
be made.

A tender, to be available, must be made before the actual commencement of the action, that is, before the issuing of the writ.<sup>c</sup> It is no objection to a plea of tender, that the plaintiff's attorney had been previously instructed to issue a writ, and had written a letter to the defendant demanding payment, provided the tender had been made before the writ was issued.<sup>d</sup>

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A defendant who offers payment after action commenced, and before declaration, is not to be indulged by a stay of proceedings on payment of the demand and costs of the writ, unless he can show an actual tender, or that the declaration was delivered for the sake of enhancing the costs.<sup>e</sup>

2.—*By and to whom made.*] The tender must be made by the debtor or some person duly authorised on his behalf.<sup>f</sup> Any person may make a tender on behalf of an idiot.<sup>g</sup> Where an agent being authorised to tender a less sum only, offered the whole demand; it was held sufficient, though the offer of the residue was at his own risk.<sup>h</sup>

To whom  
a tender  
must be  
made.

A tender to a servant or agent authorised to receive money for the plaintiff, is equivalent to a tender made to the plaintiff himself.<sup>i</sup> And even where the principal directed his clerk, who had previously been authorised to receive money on his account, not to receive money if offered to him by the defendant, as he had instructed an attorney to sue him, and the clerk on the tender being made, refused to take it, assigning his reason, it was held a good tender to the principal.<sup>j</sup> But a tender made to the managing clerk of the plaintiff's attorney, who at the time disclaims authority from his master to receive the debt, is insufficient.<sup>k</sup> A tender to the plaintiff's attorney on the record is good.<sup>l</sup> So a tender to a person in the office of an

*infra*, Lord Denman said, that perhaps Lord Holt's impression was the correct one. See 1 Saund. 33 *b. n.*

<sup>a</sup> Johnson *v.* Clay, 7 Taunt. 486. (2 Eng. C. L. 181.) With reference to this case, Parke, Baron, said, in Poole *v.* Crompton, *supra*, "that there must be some mistake in the report, for it is not necessary, in order to defeat a tender, that the plaintiff should prove a demand subsequent to the tender."

<sup>b</sup> Searle *v.* Barrett, 4 Nev. & M. 200, *post*, 173.

<sup>c</sup> Bro. Tend. Pl. 9.

<sup>d</sup> Briggs *v.* Calverly, 8 T. R. 629. Moffatt *v.* Parsons, 5 Taunt. 307. (1 Eng. C. L. 114.)

<sup>e</sup> Gibbon *v.* Copeman, 5 Taunt. 140. (1 Eng. C. L. 284.)

<sup>f</sup> Cropp *v.* Hambleton, Cro. Eliz. 48. As to tender by a stranger without the privity of the debtor, see Co. Inst. 207, Cro. El. 132.

<sup>g</sup> Co. Litt. 206.

<sup>h</sup> Read *v.* Goldring, 2 M. & S. 86.

<sup>i</sup> Goodland *v.* Blewith, 1 Campb. 477.

<sup>j</sup> Moffatt *v.* Parsons, 5 Taunt. 307. (1 Eng. C. L. 114.)

<sup>k</sup> Bingham *v.* Allport, 1 Nev. & M. 398. (28 Eng. C. L. 324.)

<sup>l</sup> *Per Curiam*, in Crozer *v.* Pilling, 4 B. & C. 29. (10 Eng. C. L. 272.) The

attorney, (who was instructed by the plaintiff to apply for payment,) to whom the debtor is referred by one of the clerks, and who does not refuse to receive the money on the grounds that he has no authority, is sufficient.<sup>a</sup> Where the plaintiff's attorney, before bringing the action, wrote to the defendant to say that unless the debt with the *charge for that letter* were paid before Wednesday, \*proceedings would be commenced. \*164 On Wednesday morning, the defendant's agent went to the attorney's office, and there saw a boy, to whom he tendered the amount of the debt only, but the boy refused it, unless the charge for the letter was paid. The writ was issued subsequently on that day. Held, a sufficient tender; for the letter which authorised the payment of the debt at the attorney's office, together with the charge for the letter, which the attorney had no right to make, conveyed an implied authority to any body in the office to receive what was justly due.<sup>b</sup> A tender to one of several joint creditors is good.<sup>c</sup> So is a tender to an executor, even before he has proved the will provided he afterwards prove it.<sup>d</sup>

3.—*In what specie and to what amount a tender must be made.*] By the statute 56 Geo. III, c. 68, ss. 11 & 12, gold coin is declared to be the only legal tender, and no tender of silver coin beyond the sum of 40s. is legal.

But the 3 & 4 W. IV, c. 98, s. 6, enacts, "that from and after the first day of August, 1834, unless and until parliament shall otherwise direct, a tender of a note or notes of the Governor and Company of the Bank of England, expressed to be payable to bearer on demand, shall be a legal tender to the amount expressed in such note or notes, and shall be taken to be valid, as a tender to such amount, for all sums above *five* pounds, on all occasions on which a tender of money may be legally made, so long as the Bank of England shall continue to pay on demand their said notes in legal coin: Provided always, that no such note or notes shall be deemed a legal tender of payment by the Governor and Company of the Bank of England, or any branch bank of the said Governor and Company; but the said Governor and Company are not to become liable, or to be required to pay and satisfy, at any branch bank of the said Governor and Company, any note or notes of the said Governor and Company not made specially payable at such branch bank; but the said Governor and Company shall be liable to pay and satisfy, at the Bank of England, in London, all notes of the said Governor and Company, or of any branch thereof."

A tender of a Bank of England note to the amount of 5l. is good, except at the Bank.

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question here related to a tender of damages recovered, and for which the defendant was taken into execution.

<sup>a</sup> Wilmott v. Smith, 3 C. & P. 453. (14 Eng. C. L. 386.) M. & M. 238.

<sup>b</sup> Kerton v. Braithwaite, 1 M. & W. 310. <sup>c</sup> Douglass v. Patrick, 3 T. R. 683.

<sup>d</sup> Eq. Cas. Ab. 319. Bac. Ab. Tender, E.

Country bank notes are a good tender if not objected to on that account. Tender of a larger sum, when good.

To invalidate a tender, or divest an offer to pay of the legal effect of tender, if the objection be to the medium of the offer to satisfy and not to the sum offered, the ground of the objection must be stated, or it is a waiver of the objection of insufficiency in that particular respect, and it cannot afterwards be taken advantage of in court on the score of not being an effective legal tender; in other words, an objection on a point of fact, works a waiver of objections on points of law, and such waiver may be implied though not expressed. Thus an offer to pay a debt in country bank notes is in effect a good legal tender, if it is refused on the ground only of the amount being insufficient;<sup>a</sup> and before the passing of the above act, it was decided that a tender of Bank of England notes was good if not objected to at the time on that account.<sup>b</sup>

If a man tender more than he ought to pay it is good, for *omne majus continet in se minus*, and the other ought to accept so much of it as is due to him.<sup>c</sup> But in such a case the tender should consist of moneys numbered.<sup>d</sup> For a tender of a larger sum *requiring change*, is not a good tender of a smaller sum.<sup>e</sup> If I tender a man twenty guineas in the current coin of the realm, this may be a very good tender of fifteen, for he has only to select so much and restore me the residue. But a tender in bank notes is quite different, for it may be made in such a way that it is physically impossible for the creditor to take what is due and return the difference. If 3*l.* 10*s.* could be tendered by a note for 5*l.*, so it might by a note for 50,000*l.*<sup>f</sup>(1)

\*166 But a tender of a bank note in payment of a fractional sum is sufficient if the creditor refuses to receive it, merely because he is entitled to a larger sum than that which is offered to be paid, and not on the ground that he has no change, though he is required to return the difference, between the note and the sum offered.<sup>g</sup> Proof of a tender of 20*l.* 9*s.* 6*d.* in bank notes and silver, is sufficient to support a plea of tender of 20*l.*<sup>h</sup> Where the defendant threw a guinea and some bank notes on a table, saying to the plaintiff, "there is the balance of the ac-

<sup>a</sup> Polglasse v. Oliver, 2 C. & J. 15. Lockyer v. Jones, Peake, 180, n. Tiley v. Courtier, 2 C. & J. 16, n.

<sup>b</sup> Brown v. Saul, 4 Esp. 267. Wright v. Reed, 3 T. R. 554.

<sup>c</sup> Wade's Case, 5 Co. 115, recognised by Littledale, J., in 4 B. & Ad. 548. (24 Eng. C. L. 115.)

<sup>d</sup> Per Le Blanc, J., 3 Campb. 70.

<sup>e</sup> Robinson v. Cook, 6 Taunt. 336. (1 Eng. C. L. 404.)

<sup>f</sup> Per Le Blanc, J., in Betterbee v. Davis, 3 Campb. 70. See Brady v. Jones, 2 D. & R. 305. (16 Eng. C. L. 87.) Watkins v. Robb, 2 Esp. 710; where it was held that a tender of a 5*l.* note by the defendant, who demanded six pence change, was not good, as the plaintiff was not bound to give him change.

<sup>g</sup> Saunders v. Graham, Gow. 121. (5 Eng. C. L. 483.) Cadman v. Lubbock, 5 D. & R. 289. (16 Eng. C. L. 235.)

<sup>h</sup> Dean v. James, 4 B. & Ad. 546. (24 Eng. C. L. 114.)

(1) (A demand of more than is due will not excuse an actual tender of what is due. *Dra- ham v. Jackson*, 6 Wend. 22.)

count," the plaintiff refused to take up the money and went away, upon which the money was counted over by the witness and found to amount to 17*l.* 1*s.*; held, to be sufficient evidence to support a plea of tender of that sum.<sup>a</sup>

4.—*In what mode a tender should be made.*] To make a legal tender, the actual production of the money due, in moneys numbered, is not necessary, if the debtor, having it ready to produce, and offering to pay it, the creditor dispense with the production of it at the time, or do any thing which is equivalent to that;<sup>b</sup> "either there must be an actual offer of the money, or the party must be ready to pay it at the time when the actual offer of it is dispensed with."<sup>c</sup> Therefore, where the defendant, on departing from home left 10*l.* with his clerk for the plaintiff, shortly after which the plaintiff called, and demanded a larger sum; when the clerk told him, that the defendant had left 10*l.* for him, the plaintiff said he would not receive it, or any thing less than his whole demand, *but the clerk did not offer the 10*l.**; held, not to be a sufficient tender.<sup>d</sup> So, when the defendant went to the plaintiff's attorney, and saying that he was come to settle with him the plaintiff's account, produced a paper containing the statement of the account, in which he made the balance 5*l.* 5*s.*, *which he said he was ready to pay, but produced no money nor notes*; the attorney said he could not take that sum, as his client's demand was above 8*l.*; held, no tender.<sup>e</sup> So where the defendant \*or-  
 \*167  
 dered *A.* to pay the plaintiff 7*l.* 12*s.*, and the clerk of the plaintiff's attorney demanded 8*l.*; upon which *A.* said that he was only ordered to pay 7*l.* 12*s.*, which sum was in the hands of *B.*, and *B.* put his hand into his pocket to take out the 7*l.* 12*s.*, but did not do so, by the desire of *A.*; but *B.* in giving his evidence, could not say that he had that sum in his pocket at the time, but he was sure that he had it in his house, at the door of which he was standing at the time; held, not a sufficient tender, as the money should have been produced to the attorney's clerk.<sup>f</sup>

If a party tell his creditor that he will pay him so much, and put his hand into his pocket to take out the money, but before he takes it out the creditor leaves the room, and the money consequently is not produced till he is gone, it is no tender.<sup>g</sup> But where a person offered a sum of money by way of tender, and stated the precise sum which he so offered, which he held in his hand twisted up, in bank notes, sovereigns, and silver,

<sup>a</sup> *Holland v. Phillips*, 6 Esp. 46.

<sup>b</sup> Per Lord Ellenborough, C. J., in *Thomas v. Evans*, 10 East, 102.

<sup>c</sup> Per Grose, J., *id.*

<sup>d</sup> *Thomas v. Evans*, *id.*

<sup>e</sup> *Dickinson v. Shee*, 4 Esp. 68, cited by Bayley, J., in the last case.

<sup>f</sup> *Kraus v. Arnold*, 7 Moore, 59. (17 Eng. C. L. 70.) But see *Harding v. Davies*, *infra*.

<sup>g</sup> *Leatherdale v. Sweepstone*, 3 C. & P. 342. (14 Eng. C. L. 338.)

but not shown to the creditor; held, a sufficient tender; but *semble* it would not be good if he had not mentioned the amount.<sup>a</sup> So where the debtor expressed to the creditor his willingness to pay 10*l.*, and a third person present offered to go up stairs to fetch that sum, but was prevented by the creditor's saying, "he could not take it;" held, a sufficient tender, and the debtor's pleading it afterwards was an adoption of the act of such third person, although he did not notice it at the time.<sup>b(1)</sup>

A tender of payment by a purchaser, in order to obtain an article purchased, is unnecessary, where the vendor admits that the tender would be fruitless.<sup>c</sup>

The tender must be unconditional.  
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A tender, to be good, must be unconditional, and unaccompanied with any terms.<sup>(2)</sup> Therefore, if the defendant says to the plaintiff, "If you give me a stamped receipt, I will pay you the money," it is not sufficient.<sup>d</sup> So an offer \*to pay, provided the creditor will give a receipt in full of all demands, is no tender.<sup>e</sup> So an offer to pay a certain sum as the whole balance, where a larger sum is claimed.<sup>f</sup> So if the defendant lays down a sum of money, and the plaintiff offers to take it as part of the debt, and the defendant will not allow him to take it on such conditions, saying, that no more is due, it is no tender.<sup>g</sup> So where the plaintiff proposes to take the sum offered in part payment, and the defendant will only allow him to take it as a settlement, it is not a good tender.<sup>h</sup>

But though the debtor makes the tender on condition of getting a receipt in full, it is good if objected to at the time, merely on account of the insufficiency of the sum.<sup>i</sup>

Tender must be pleaded.

5.—*How to be pleaded.*] A tender cannot be given in evidence on the general issue, it must be pleaded specially. It may be pleaded to the whole declaration, though the usual practice is to plead it to one count only, if there be more than one, or to plead *non assumpsit* to a part, and a tender as to

<sup>a</sup> *Alexander v. Brown*, 1 C. & P. 288. (11 Eng. C. L. 395.) Best.

<sup>b</sup> *Harding v. Davies*, 2 C. & P. 77. (12 Eng. C. L. 35.) Best, C. J., observed that if the man said, "I have got the money, but must go a mile for it," it would not be a tender.

<sup>c</sup> *Jackson v. Jacob*, 3 Bing. N. C. 869.

<sup>d</sup> *Laing v. Meader*, 1 C. & P. 257. (11 Eng. C. L. 382.) *Ryder v. Townsend*, (Lord,) 7 D. & R. 119. (16 Eng. C. L. 272.) The proper course for a debtor is to take a stamp with him, and require of the creditor to give him a receipt thereon, and pay him the price of the stamp; and if the creditor refuses, he will be liable to a penalty, under the 43d Geo. III, c. 126, s. 4.

<sup>e</sup> *Griffith v. Hodges*, 1 C. & P. 419. (11 Eng. C. L. 440.) *Huxham v. Smith*, 3 Campb. 21.

<sup>f</sup> *Strong v. Harvey*, 3 Bing. 304. (11 Eng. C. L. 112.) *Higham v. Baddeley*, Gow. 213. *Evans v. Judkins*, 4 Campb. 156. *Gordon v. Cox*, 7 C. & P. 173.

<sup>g</sup> *Peacock v. Dickerson*, 2 C. & P. 51, n. (12 Eng. C. L. 24.)

<sup>h</sup> *Mitchell v. King*, 6 C. & P. 237. (25 Eng. C. L. 374.)

<sup>i</sup> *Cole v. Blake*, Peake, 179.

(1) (*Bakeman v. Poole*, 15 Wend. 637. *Brown v. Gilmore*, 8 Greenleaf, 107.)

(2) (*Brown v. Gilmore*, *supra*.)



the rest. But the defendant will not be permitted to plead double; first, *non assumpsit*, or *non est factum*, to the whole declaration, and then tender as to part, for they are incompatible.<sup>a</sup> In this plea it is not sufficient to state that the defendant *is, and always has been ready to pay*, he must also say that he *tendered and offered to pay*.<sup>b</sup> It must also be averred, that the defendant hath *always*,<sup>c</sup> \*from the time of making the said promises, &c., been ready to pay, and still is ready to pay, the said sum, &c. In an action by the indorsee against the acceptor of a bill of exchange, which was dishonored, the defendant pleaded a subsequent tender of the amount, charges and interest, before action brought, and that he always, *from the time of making* the tender, had been, and still was, ready to pay; the court held, that the plea was insufficient, for a plea of tender is applicable only to cases where the party pleading it has never been guilty of any breach of his contract.<sup>d</sup> But the drawer or indorser of a bill of exchange may plead a tender made within a reasonable time of notice of dishonor.<sup>e</sup>

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The action of assumpsit being to recover damages from the defendant for the non-performance of his contract, a tender cannot in this action be pleaded in bar of the damages; for that would be to preclude the plaintiff from recovering his debt, which cannot be, for the debtor must, nevertheless, pay the debt. Therefore the form of the plea in that case is, to confess the damages due and bring the money into court and pray judgment of further damages, such as interest and the costs of bringing the action. But in debt, as the judgment is to recover the debt, and damages are merely auxiliary, being only for the detention and delay of the debt, the proper form is to plead a tender in bar of the damages; but still a tender is no bar to the action in *debt* any more than in assumpsit.<sup>f</sup>

In assumpsit, a tender cannot be pleaded in bar of damages; but in debt it is otherwise.

The precise sum tendered should be stated, and the averment will be proved though the defendant tendered a larger sum than that stated.<sup>g</sup> A plea to an avowry of a tender of

<sup>a</sup> 1 Saund. 33, *d. n.* Maclellan v. Howard, 4 T. R. 194. Jenkins v. Edwards, 5 T. R. 97. Orgill v. Kempshhead, 4 Taunt. 459.

<sup>b</sup> 1 Saund. 33, *d. n.*

<sup>c</sup> In assumpsit or debt on a single bond, if the defendant pleads tender, he must plead that he has been always ready; for although the defendant tendered the money, and has been always ready since the tender to pay it, yet the plaintiff may have demanded it before, it being a duty from the time of the promise. And if the defendant did not pay it on demand, his promise was broken, though he tendered it afterwards. But if he pleads that he was always ready, this refers to the time of the promise made, and not to the time of the tender, per Holt, C. J., in Giles v. Hartis, 1 Lord Raym. 254. An averment of *tout temps prist* in a plea of tender, is one of those landmarks in pleading which ought never to be departed from. Per Lord Ellenborough, in Hume v. Peploe, 8 East, 169.

<sup>d</sup> Hume v. Peploe, 8 East, 168.

<sup>e</sup> Walker v. Barnes, 4 Taunt. 240. (1 Eng. C. L. 91.)

<sup>f</sup> Giles v. Hartis, 1 Lord Raym. 254. 2 Salk. 623. 1 Saund. 33, *c. n.*

<sup>g</sup> Stark. Ev. 1559. See Dean v. James, 4 B. & Ad. 547, (24 Eng. C. L. 114,) *ante*, 166.



16*l.* will not be supported by proof of a tender of 15*l.* 16*s.*, though no more rent was due than the sum proved to have been tendered.<sup>a</sup>

Replica-  
tion.

\*170  
May deny  
the tender,  
or set up a  
subse-  
quent de-  
mand.

To a plea of tender the plaintiff may in his replication deny the tender, and thereby dispute its formality, or may \*admit the tender and proceed to trial for a larger amount; or he may set up a prior or subsequent demand and a refusal of the precise sum tendered. In such a case it will be incumbent on him to prove the *precise* sum stated to have been before tendered to and refused by him. To an action on a bill of exchange for 10*l.* 4*s.* the defendant pleaded *non assumpsit* to a part and a tender of 4*l.* 7*s.* 6*d.*; replication, that after the cause of action accrued and before the tender, the plaintiff demanded the sum tendered. The evidence was, that the bill was presented when due and payment demanded; no other demand was proved. The court said, that the issue was as to the specific fact whether the plaintiff did or did not before the tender of the 4*l.* 7*s.* 6*d.* demand that very sum of the defendant, and the evidence did not support that issue. The plaintiff ought to have proved a demand of the specific sum mentioned in the declaration.<sup>b</sup>

By whom  
a subse-  
quent de-  
mand  
should be  
made.

A demand of the debt, to do away the effect of a tender, must be by some one authorised to receive the money,<sup>c</sup> and to give the debtor a discharge.<sup>d</sup> Where a tender to the landlord is pleaded in bar to a cognisance for rent, and the defendant replies a subsequent demand by himself, the replication is not supported by evidence of a demand by his agent.<sup>e</sup> Where a tender is made by two debtors who are jointly liable, a subsequent demand of *one* of them is sufficient.<sup>f</sup> The demand should be personal, that the defendant may have an opportunity of paying the sum demanded: therefore a letter sent by the plaintiff's attorney demanding the sum tendered, is not sufficient to support a replication of a subsequent demand and refusal.<sup>g</sup>

<sup>a</sup> John v. Jenkins, 1 C. & M. 227.

<sup>b</sup> Rivers v. Griffiths, 5 B. & A. 630. (7 Eng. C. L. 215.) Spybey v. Hide, 1 Campb. 181.

<sup>c</sup> Coore v. Callaway, 1 Esp. 115. A subsequent demand, accompanied with a demand of another sum not due, is insufficient, *id.*

<sup>d</sup> Coles v. Bell, 1 Campb. 478, *n.* In this case, and in the preceding case, the demand was made by the clerk of the plaintiff's attorney, who had never seen the defendant before going upon this errand. Lord Ellenborough held it insufficient, observing that a demand by the attorney himself might have done.

<sup>e</sup> Pimm v. Grevill, 6 Esp. 95.

<sup>f</sup> Peirse v. Bowles, 1 Stark. 323. (2 Eng. C. L. 409.)

<sup>g</sup> Edwards v. Yeates, R. & M. 360. (21 Eng. C. L. 456.) But see Hayward v. Hague, 4 Esp. 93, where it was held, that a letter demanding payment sent to the defendant's house, to which an answer was returned that the demand should be settled, was held to be sufficient evidence to go to the jury of a demand and refusal.

## \*SECTION XXI.

## PAYMENT OF MONEY INTO COURT.

WHEN tender is pleaded, the defendant should pay the money into court, otherwise the plaintiff may sign judgment as for want of a plea.<sup>a</sup>

But where in an action of debt the defendant pleaded the general issue as to part, and as to the other part a tender, but omitted to pay the money into court, judgment having on that account been signed as for want of a plea, it was set aside for irregularity.<sup>b</sup> It has been decided that after a plea of tender the plaintiff cannot be nonsuited. In paying the amount tendered into court, care should be taken to have it paid in on the particular count to which the tender is pleaded.<sup>c</sup> For where in an action on a special contract and on money had and received, &c., the defendant pleaded the general issue, and to the common counts a tender; and he paid money into court generally, not applying it to any particular count; held, that such payment could not be referred exclusively to the count to which tender was pleaded; but that it applied to the whole declaration, and admitted the special contract.<sup>d</sup>

Payment  
into court  
after ten-  
der.

If the defendant has neglected to make a tender, he may relieve himself by paying the debt into court, after action brought, together with the costs of the action up to that time; and in case the plaintiff refuses to accept the money, he proceeds at his peril, insomuch, that if at the trial he be nonsuited,<sup>e</sup> or the jury shall not give him a sum exceeding the money paid into court, he will be obliged to pay the costs of the action, though he is still entitled to take the money out of court, as well in this case as in a plea of tender; for the defendant in both cases admits, that the plaintiff has a cause of action to the amount of the money tendered or paid into court.<sup>f</sup> The general rule is, that money may be paid into court where the action is brought for a sum certain or capable of being ascertained by computation, but not in an action for general damages.<sup>g</sup>

Payment  
into court  
where no  
tender has  
been made

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The statute 3 and 4 W. IV, c. 42, s. 21, enacts, "that it shall be lawful for the defendant in all personal actions, (except actions for assault and battery, false imprisonment, libel, slander,

<sup>a</sup> Pether v. Shelton, 1 Stra. 638. 1 Tidd's Prac. 612.

<sup>b</sup> Chapman v. Hicks, 2 Dow. P. C. 641. See also Gutteridge, v. Smith, 2 H. Bl. 374.

<sup>c</sup> Harding v. Spicer, 1 Campb. 327. See the note of the learned reporter.

<sup>d</sup> Bulwer v. Horne, 4 B. & Ad. 132. (24 Eng. C. L. 40.)

<sup>e</sup> A plaintiff may be nonsuited though the defendant pays money into court, Tidd. 295. Cotterell v. Apsey, 6 Taunt. 324. (1 Eng. C. L. 400.)

<sup>f</sup> 1 Saund. 33, d.

<sup>g</sup> Hallett v. E. I. Company, 2 Burr. 1120. Salt v. Salt, 8 T. R. 47. 1 Saund. 33, c. 5th ed.

malicious arrest or prosecution, criminal conversation or debauching of the plaintiff's daughter or servant,) by leave of the court where such action is pending, or a judge of any of the said superior courts, to pay into court a sum of money by way of compensation or amends, under such regulations as to payment of costs, and forms of pleading, as the said judges shall by any rules or orders direct."

Pursuant to the preceding enactment, the practice now is, where money is paid into court, such payment shall be pleaded in all cases.<sup>a</sup>

The plaintiff, after the delivery of a plea of payment into court, shall be at liberty to reply to the same, by accepting the sum so paid in full satisfaction and discharge of the cause of action in respect of which it has been paid in, &c., or that he has sustained damages, (or that the defendant is indebted to him, *as the case may be*,) to a greater amount than the said sum, and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.<sup>b</sup>

An action for damages, occasioned by the negligently running down the plaintiff's boat by the defendant's vessel, is not an action for a debt or demand, within the meaning of the foregoing act.<sup>c</sup>

Where a whole count applies to a demand for unliquidated damages, money cannot be paid into court on a part of it.<sup>d</sup>

\*173 Where there are several counts for several causes of action, or several breaches are assigned in covenant, the defendant may \*plead payment into court of one entire sum, in full satisfaction of all the counts or breaches.<sup>e</sup>

Money may be paid into court on one of several breaches of covenant, contained in a lease set forth in the declaration; if the plaintiff's particular specifies the sum he claims for that breach.<sup>f</sup>

In an action by landlord against tenant, for not repairing, the court refused to allow the defendant to pay money into court by way of compensation and amends, under 3 and 4 W. IV, c. 42, s. 21, under a plea in the form given by Reg. 17 H. T. 4 W. IV, and under a plea of tender before action brought.<sup>g</sup>

A plea of payment into court beginning "as to so much, parcel," &c., and concluding without *any prayer of judgment*, is bad on special demurrer; not being in the form required by the 17th rule. If it is intended to defend part of the action, and to pay into court as to the other part, the plea or pleas in

<sup>a</sup> R. G. H. T. 4 W. IV, 17.

<sup>b</sup> R. Gen. H. T. 4 W. IV, 19.

<sup>c</sup> Watson v. Abbot, 2 C. & M. 150.

<sup>d</sup> Hodges v. Lord Litchfield, 2 Dowl. P. C. 741.

<sup>e</sup> Marshall v. Whiteside, 1 Mees. & Wels. 188. 4 Dowl. P. C. 766.

<sup>f</sup> Smith v. King, 2 Dowl. P. C. 751.

<sup>g</sup> Serle v. Barrett, 4 Nev. & M. 200, S. C.; nom Dearle v. Barrett, 2 Adol. & Ellis, 82. (29 Eng. C. L. 41.)

bar should be pleaded first, and the payment into court should be pleaded as to the residue.<sup>a</sup>

Upon a declaration of two counts, the defendant paid into court enough to cover the demand in the first instance, and obtained a verdict on the second; but having omitted to plead the payment as required by the new rules; held, that he was not entitled to costs.<sup>b</sup>

A plea of payment of a less sum of money into court on a general *indebitatus* count or counts, is good, though the amount intended to be appropriated to each count is not shown. But *semble* if there be a count on a bill of exchange, the defendant in pleading must answer the whole amount of the bill; and a plea of payment into court alone of a sum less than the amount of the bill, would be bad, and it would also be bad though of a larger amount, if pleaded to a count on a bill, and any other counts, unless a sufficient amount be specifically appropriated in the plea to the bill.<sup>c</sup>

\*To a declaration in assumpsit for non-performance of a contract to receive and pay for a copper, made to order, at a specified price per pound weight, the defendants pleaded, *inter alia*, the payment into court of 15/, and that the plaintiff had not sustained damage to a greater amount; held, that they could not under this plea give in evidence, that they had countermanded the order when only a part of the work had been done.<sup>d</sup> \*174

The new rules have made no alteration in the effect of payment into court.

The result of all the cases on this subject, is, that payment of money into court admits every thing which the plaintiff would be obliged to prove in order to recover that money.<sup>e</sup> (1) **Effect of payment of money into court.** Where two breaches were assigned in one count of a declaration upon a contract, and the defendant paid money into court upon one of them; held, that he thereby admitted the whole contract as set out in that count.<sup>f</sup> Payment of money into court generally on the whole declaration, admits the contract as stated in each count, and a breach of it, and that something is due on each count thereon; but it does not admit the amount of the breach there stated.<sup>g</sup> If payment of money into court is made on a count alleging a special contract, it operates<sup>h</sup> as an admission of that contract: if, on a general *indebitatus* count, for work and labor, or the like, on which the plaintiff might recover for one or more distinct contracts, it operates as an ad-

<sup>a</sup> *Sharman v. Stevenson*, 1 Gale, 74. 3 Dowl. P. 709. 2 C. M. & R. 75. 5 Tyr. 564.

<sup>b</sup> *Adlard v. Booth*, 1 Bing. N. C. 693. (28 Eng. C. L. 548.) 1 Scott, 644.

<sup>c</sup> *Jourdain v. Johnson*, 1 Gale, 312. 4 Dowl. 534. 5 Tyr. 524.

<sup>d</sup> *Stevens v. Ufford*, 7 C. & P. 97. Tindal.

<sup>e</sup> *Per Curiam*, in *Dyer v. Ashton*, 1 B. & C. 4. (8 Eng. C. L. 5.)

<sup>f</sup> *Id.* *Cox v. Brain*, 3 Taunt. 94.

<sup>g</sup> *Stoveld v. Brewin*, 2 B. & A. 116.

(1) (A plea of tender and payment of money into court, precludes objection to the form of action, *Bailey v. Bucher*, 6 Watts, 74.)

mission of liability to that amount on some one or more of such contracts; its effect in both cases is the same as if a payment had been made by the defendant of the like sum before action brought.<sup>a</sup> Payment of money into court does not bind the defendant to admit the particulars of demand annexed to the declaration,<sup>b</sup> by the rule of T. T. 1 W. IV; as the particulars are not necessarily connected with the payment.<sup>b</sup> Where to

\*175 \*a demand for 15*l.* the defendant paid 5*l.* into court, and at the trial gave evidence to show that the items in the account beyond the 5*l.* was a debt owing from his mother; held, that the evidence was properly received. Patterson, J., said, that there was no analogy between the old practice of paying money into court and the present plea, as formerly *non assumpsit* was pleaded at the same time that the money was paid. The defendant, he said, by his plea admitted a liability on all the causes of action stated in the declaration; but as the declaration was in general terms, the plea admitted no more than the contract generally. For the particulars of demand were not to be considered as incorporated in the declaration.<sup>c</sup>

Payment of money into court on a count on a promissory note payable by instalments, is only an admission by the defendant, that money to the amount paid in was due on the note; it does not bar the statute of limitations as to a further sum claimed to be due on the same note.<sup>d</sup> In *Cox v. Parry*,<sup>e</sup> it was decided that payment of money into court is an acknowledgment by the defendant of the contract, and that the plaintiff is entitled to recover the sum so paid; that it did not preclude him from taking any objection limiting the operation of the contract, in order to bar the plaintiff from recovering more than had been paid into court.<sup>f</sup>

Where money was paid into court in an action on an attorney's bill, it was held, that such payment admitted that the plaintiff was employed as an attorney, but not that he was to be paid the fees as of right payable to an attorney, and that the defendant was not thereby precluded from showing that the plaintiff had agreed that he should charge for his services only the money actually disbursed.<sup>g</sup>

<sup>a</sup> Per Parke, J., *Meager v. Smith*, 4 B. & Ad. 680. (24 Eng. C. L. 140.)

<sup>b</sup> Per Littledale, J., *id.* In *Richardson and Wife v. Robertson*, 1 M. & W. 463. where it appeared that a sum of money had been paid to the plaintiff after action brought, and there was no plea of payment, the court, on motion, the payment not being denied, allowed the damages to be reduced by that sum.

<sup>c</sup> *Booth v. Howard*, MSS. H. T. 1837, 1 N. & P.

<sup>d</sup> *Reid v. Dickons*, 5 B. & Ad. 499. (27 Eng. C. L. 113.) 2 N. & M. 369.

<sup>e</sup> 1 T. R. 464.

<sup>f</sup> Per Patteson, J., in *Reid v. Dickons*, 5 B. & Ad. 501. (27 Eng. C. L. 114.)

<sup>g</sup> *Jones v. Read*, 1 N. & P. 18.

## \*SECTION XXII.

## REPLICATION.

THE new rules do not apply to replications.\*

It has recently been decided that the replication *de injuria sua propria absque tali causa*, which heretofore had been confined to actions *ex delicto*, is applicable in assumpsit whenever the plea admits the promise as stated in the declaration and alleges an excuse for its non-performance, and the defendant does not claim an interest in the subject matter of the action, or an authority from the plaintiff to retain it. In assumpsit by the indorser against the maker of a promissory note, the defendant pleaded that after having made the note he indorsed it to one R., who undertook to discount it, but who fraudulently appropriated it to his own use; that the plaintiff was privy to the fraud, that he indorsed it to him without value or consideration, and that there never was any value or consideration for the note between any of the parties thereto; the plaintiff replied *de injuria sua propria*, &c. Held, that the replication was good; for the plea confessed that the defendant made the note and that it was indorsed to the plaintiff, which constituted a *prima facie* case of liability, and an implied promise to pay the amount to the plaintiff, and it avoided the effect of that admission, by showing that the note was made and indorsed without value *bond fide* paid, whereby the defendant was *excused* from performing that promise. "Though several facts were necessarily averred in the plea as constituting part of it, yet in substance it contained one ground of defence only, that is, that the plaintiff was not the *bond fide* holder for value, and the rule of pleading was not that issue should be joined on a single fact, but on a single point of defence. If this replication were not allowed, great inconvenience would follow; for in every action on a bill or note, it would be competent for a defendant, by alleging fraud or such other circumstance as would throw the proof of value on the plaintiff, to compel him to prove it. For it would seldom happen that a plaintiff, if he were tied down to dispute one fact, would take issue on such allegation, and then he would be obliged to take an issue which would admit the fraud and throw the proof of value on himself, thereby placing himself in a worse situation than before the new rules. On the other hand, by allowing this replication, the indorsee was left in the same situation as he was before with the additional advantage, that he was made acquainted with the defence intended to be set up, which was one great object of the pleading regulations; and he would

When the replication *de injuria*, &c., is good in assumpsit.

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\* Per Patteson, J., in *Brown v. Daubeney*, 1 H. & W. 647, *ante*, 161.



be called upon to prove value given or not, according as the defendant would prove, or fail in proving the allegation of fraud as he would before under the general issue.”<sup>a</sup>

*De injuriā.*

Where in assumpsit on a promissory note, the defendant pleaded that the note was given upon an agreement, that the plaintiff should advance to the defendant certain money and goods, and that the plaintiff did not perform his agreement; held, that *de injuriā* was a good replication to the plea.<sup>b</sup>

When *de injuriā*, &c. cannot be replied.

Where the plea in effect *denied* that the defendant had made the promise alleged in the declaration, it was held that *de injuria* was bad.<sup>c</sup> So where the defendant by his plea *claimed an interest* in the property for which the action was brought, and a right to retain it by and in consequence of an authority given by the plaintiff.<sup>d</sup> So, where the declaration was for a breach of contract in not paying for goods by bills with security, and the plea set out a custom of trade that such security was only given when it was demanded before the goods were delivered; held, that *de injuria sua propria* was not a proper replication, for the plea did not admit the promise set out in the declaration and excuse the nonperformance; but in effect denied that such promise was made.<sup>e</sup> So, where the plea was not *matter of excuse* for the breach of the contract, but of a subsequent satisfaction for that breach, it was held that *de injuria* could not be replied.<sup>f</sup>

The replication *de injuria sua propria* puts in issue all the facts stated in the plea.

<sup>a</sup> Per Lord Abinger, C B., in delivering the judgment of the court in *Isaac v. Farrar*, 1 M. & W. 65. 1 Gale, 385. *Griffin v. Yates*, 2 Bing. N. C. 579. (29 Eng. C. L. 430.) 1 Hodges, 387.

<sup>b</sup> *Watson v. Wilkes*, 5 Ad. & Ell. 237. 2 H. & W. 187. *Lorymer v. Visou*, 3 Hodges, 38.

<sup>c</sup> *Solly v. Neish*, 1 Gale, 227.

<sup>d</sup> *Id.*

<sup>e</sup> *Whittaker v. Mason*, 1 Hodges, 319. 2 Bing. N. C. 359. (29 Eng. C. L. 357.)

<sup>f</sup> *Crisp v. Griffiths*, 2 C. M. & R. 159. 1 Gale, 106.

\*CHAPTER II.

ATTORNEY.—OF AN ACTION ON AN ATTORNEY’S BILL.

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SECTION I,

THE REQUISITES TO ENTITLE AN ATTORNEY TO HIS COSTS.

An attorney may sue for the amount of his bill in an action of assumpsit or debt. The former, however, is the usual remedy.

In general, to entitle an attorney to recover his costs, 1. He must have been duly admitted, and have his name enrolled in the court in which the business has been done. 2. He must have taken out his certificate within the year. 3. He must have been retained by the party who is to pay him. 4. And he must have discharged his duty towards his client with skill, diligence and integrity.

If an attorney practise in a court in which he has not been admitted, he cannot maintain an action for his costs, not even for money out of pocket, nor has he a lien for them;<sup>a</sup> nor can <sup>b</sup>he recover his costs if his name be not enrolled, though he be otherwise duly qualified. Where the plaintiff signed the roll on which attorneys enter their names when sworn in, and also the parchment instrument by which the judges authorise their admission, but he had not taken the instrument to the clerk of the warrants’ office, to have his name enrolled in that office book; held, that he could not recover his costs, though he was duly cetificated.<sup>b</sup>

An attorney must be admitted.  
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<sup>a</sup> Hyde v. Latham, 3 Tyr. 143, 1 C. & M. 128. See also Constable v. Johnson, 1 Dowl. 598. Coates v. Hawkyard, 1 Russ. and M. 746, and the cases there cited. Vincent v. Holt, 4 Taunt. 452. 2 G. II, c. 23.  
<sup>b</sup> Humphreys v. Harvey, 1 Bing. N. C. 62. (27 Eng. C. L. 312.) 4 M. & Scott, 500. 2 Dowl. 62. See Young v. Dowlman, 3 Y. & J. 24.

When one attorney practises in the name of another.

But if he conduct proceedings in a court of which he has not been admitted, in *the name of an attorney of that court*, it is no objection to an action for the costs, for the court has the security of one of its own officers.<sup>a</sup> It seems, however, that though a solicitor may practise in the name of an attorney as his agent in the courts of common law, an attorney cannot practise in the name of a solicitor, as his agent in the courts of equity.<sup>b</sup> But where an attorney of *K. B.* sued out a commission of bankruptcy, it was held, that he might maintain an action for his fees without being admitted a solicitor in Chancery, for the commission was issued on the common law side of the Court of Chancery, and it was not necessary that the name of an attorney should appear on the issuing thereof.<sup>c</sup> Where two persons were in partnership as attorneys, and one of them was appointed replevin clerk to the sheriff, it was held that an action for executing a replevin bond must be brought in the name of the replevin clerk alone, although it was executed in the office where both carried on the business jointly, for the contract was with the clerk and not with both.<sup>d</sup>

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But where a party employed two attorneys, partners, to conduct a cause for him in the palace court, and one only of them was admitted on the rolls of that court; it was held, that an action in the common form lay at the suit of them both for *the costs*, though the retainer was given to the attorney of the palace court only for it was proved that there was a contract with them, and if neither of them was an attorney of that court, it would be competent to them to enter into a contract to get the business done by one who was; therefore it could make no difference that the business was transacted by one of the plaintiffs.<sup>e</sup> Where an attorney carried on business under the firm of *A. and Son*, the son not being in fact a partner, but acting as clerk to his father and receiving a salary, it was held that *A.* might sue in his own name for his bill of costs; for as the son was not a partner, he could not be said to be a party to the contract, and therefore need not be joined.<sup>f</sup>

An attorney cannot abandon a suit before its termination, with-

The contract of an attorney or solicitor retained to conduct or defend a suit is entire and continuing, viz. to carry it on till its termination; therefore, an attorney who has commenced a suit for his client, and abandons it before its termination, without cause and without giving his client reasonable notice, cannot recover his costs for the period during which he was

<sup>a</sup> *Gardner v. Cover*, 1 Gale, 45. 3 Dowl. 424. *Att.-Gen. v. Malin*, 2 Tyr, 512. 3 C. & J. 500. 1 Dowl. 576. See *Chadwick v. Hough*, 2 C. M. & R. 29, 164. 1 Gale, 143.

<sup>b</sup> *Hockley v. Bantock*, 2 Myl. & K. 437.

<sup>c</sup> *Wilkinson v. Diggell*, 1 B. & C. 160. (8 Eng. C. L. 50.)

<sup>d</sup> *Brandon v. Hubbard*, 4 Moore, 367. 2 B. & B. 11, n. (6 Eng. C. L. 4.)

<sup>e</sup> *Arden v. Tucker*, 4 B. & Ad. 815; (24 Eng. C. L. 171;) overruling *S. C.* 1 M. & Rob. 191.

<sup>f</sup> *Kell v. Nainby*, 10 B. & C. 20. (21 Eng. C. L. 17.) 5 M. & R. 76.

employed.<sup>a</sup> But if he has a reasonable cause, he may refuse to go on with a suit on giving his client reasonable notice, and in such case he will be entitled to costs.<sup>b</sup> If an attorney has reasonable and probable grounds for commencing an action, and desist from prosecuting it, because he afterwards discovers that the cause cannot be successfully proceeded with, he is entitled to his costs;<sup>c</sup> and in no case is he bound to proceed without adequate advances from time to time by his client for expenses out of pocket, provided he gives his client sufficient notice of his intention to enable him to make the required provision.<sup>d</sup> What is reasonable notice is a question for the jury.<sup>e</sup>

out a reasonable cause.

He need not proceed unless supplied with the expenses.

It is also necessary, in order to enable an attorney or solicitor to recover his costs, that he should take out his certificate; \*for if he neglects *for a whole year* to take out his certificate, he cannot sue for business done as an attorney during that period.<sup>f</sup> But if he take his certificate out *before the end of a year*, after the expiration of the period to which his preceding certificate extended, it will have a retrospective operation and enable him to recover for business done in that portion of the year during which he was uncertificated; provided his omission to take out a certificate was not with an intention to evade the payment of the duties, and the intent is a question for the jury.<sup>g</sup> Where the defendant in a suit paid the debt but refused to pay the costs, and the plaintiff's attorney proceeded to trial and issued execution for them; the court stayed the proceedings because the attorney was uncertificated, and the plaintiff had made no advances.<sup>h</sup> So where an attorney, in other respects, duly qualified, had omitted to have his name enrolled in the court, it was held, that he was not entitled to costs.<sup>i</sup> Where it appears that the plaintiff had acted as an attorney, the court will presume that he was duly qualified to act as such until the contrary be proved, and the *onus* of showing that he was not duly qualified lies on the defendant. Where, therefore, it appeared that the plaintiff was admitted an attorney, and had subsequently omitted for more than one year to take out his certificate, whereby his admission became void by the statute above referred to; but having practised as an attorney some years subsequently to the period when his original admission so became void: it was held, that it was incumbent

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He must have taken out his certificate.

<sup>a</sup> Harris v. Osbourn, 2 C. & M. 629. 4 Tyr. 445. Creswell v. Byron, 14 Ves. 274. Hoby v. Built, 3 B. & Ad. 350. (23 Eng. C. L. 91.)

<sup>b</sup> Van Sandau v. Browne, 9 Bing. 402, (23 Eng. C. L. 315,) 350, *post*.

<sup>c</sup> Per Tindal, C. J., in Lawrence v. Potts, 6 C. & P. 428. (25 Eng. C. L. 470.)

<sup>d</sup> *Id.* Wadsworth v. Marshall, 2 C. & J. 665. Rawson v. Earle, M. & M. 538.

<sup>e</sup> Hoby v. Built, *supra*.

<sup>f</sup> 37 Geo. III, c. 90, ss. 30, 31.

<sup>g</sup> Bowler v. Brown, 4 N. & M. 17. 2 Ad. & Ell. 116. (29 Eng. C. L. 47.)

<sup>h</sup> Meekin v. Whalley, 1 Bing. N. C. 59. (27 Eng. C. L. 310.) 4 M. & Scott, 494. 2 Dowl. 823.

<sup>i</sup> Humfrey v. Harvey, 1 Bing, N. C. 62. (27 Eng. C. L. 312.) 4 M. & Scott, 500.

on the defendant to show that the plaintiff was not readmitted for the court would presume that he had lawfully acted in the character of an attorney, unless the contrary was proved.<sup>a</sup>

He must  
have been  
retained.

A further requisite to entitle an attorney to his costs is, that he was employed or retained by the defendant to transact the business in respect of which he sues. If there be no direct evidence of a retainer, it may be inferred from circumstances.

- \*182 \*Proof of a retainer to commence a suit which was afterwards abated by a plea of non-joinder, is sufficient evidence of a retainer to commence another action against the parties named in the plea of abatement.<sup>b</sup> So if an attorney be employed by a person to act for him after an award has been made against him, and he is also desired to do what is needful; he will thereby be authorised to carry the whole award into effect.<sup>c</sup> An attorney or solicitor may, in the exercise of the general authority given to him by his client, defend a suit, but he cannot institute one without a special authority for the purpose.<sup>d</sup> If *A.* having employed an attorney to defend an action, assign his property to trustees for the benefit of his creditors, and the trustees direct the attorney to go on with the defence, they are liable for the subsequent business, but not for the bygone business, unless there be a special agreement in writing to make them so.<sup>e</sup>

When a  
retainer  
will be in-  
ferred.

A retainer may be inferred from the acquiescence of the defendant in the business being done by the plaintiff.<sup>f</sup> But in an action against two defendants on an attorney's bill, it is not sufficient to show a joint retainer and a joint promise by them both; it must also appear that the business was done for their joint benefit, unless the retainer was in writing, pursuant to the statute of frauds.<sup>g</sup> Where *A.* delivered papers to *B.*, an attorney, telling him that she was entitled to an estate, and that she would pay him if she recovered it, and *B.* took the papers saying, "that he would do what he could for her," and without further communication commenced an action of ejectment, which he afterwards abandoned under a conviction that *A.* had no title; held, that *B.* was not entitled to his costs, as he acted without due authority both in commencing and discontinuing the action.<sup>h</sup> Whether an attorney has been retained or not, is a question for the jury.

Where attorneys were retained by *C.* to prosecute an eject-

<sup>a</sup> *Pearce v. Whale*, 5 B. & C. 38. (11 Eng. C. L. 138.) 7 D. & R. 512.

<sup>b</sup> *Crook v. Wright*, R. & M. 278. (21 Eng. C. L. 438.)

<sup>c</sup> *Dawson v. Lawley*, 4 Esp. 65. *Anderson v. Watson*, 3 C. & P. 214. (14 Eng. C. L. 274.) See also *Buckle v. Roach*, 1 Ch. 193.

<sup>d</sup> *Wright v. Castle*, 3 Mer. 12. *Lord v. Kellett*, 2 Myl. & K. 1.

<sup>e</sup> *Becke v. Penn*, 7 C. & P. 397.

<sup>f</sup> *Cameron v. Baker*, 1 C. & P. 268. (11 Eng. C. L. 388.) *Lee v. Jones*, 2 Camp. 496. *Gray v. Wainman*, 7 Moore, 467. (17 Eng. C. L. 86.)

<sup>g</sup> *Hellings v. Gregory*, 10 Moore, 337, (17 Eng. C. L. 146,) 1 C. & P. 627. (11 Eng. C. L. 500.)

<sup>h</sup> *Tabram v. Horne*, 9 M. & R. 228.

ment for *D.*, the former showing them a power of attorney \*purporting to be executed by *D.* as his authority for retaining them, but which turned out to be a forgery. The attorneys, however, believing it to be genuine, took the cause down to the assizes where they were obliged to withdraw the record; held, that they should pay the costs of the defendant in the cause, for having prosecuted it without authority.<sup>a</sup> \*183

It is the duty of an attorney, before he undertakes a suit for his client, to inquire into all the circumstances of the case; and to give his client the best advice. The court will take care that an attorney shall fairly and honestly discharge his duty to his client; and if he brings an action to recover the amount of his bill, it lies upon him affirmatively to show that he has done all that he ought to have done, and not upon the client to show negatively that the attorney has not done his duty;<sup>b</sup> and if through inadvertence or negligence in that respect, his client has derived no benefit from his services, he cannot recover his costs.<sup>c</sup> It is also the duty of an attorney to communicate personally with his client, that the latter may reap the benefit of his advice. Where therefore an attorney had his business transacted by a clerk, in an office at a distance from his residence, it was held, that he could not recover the amount of his bill for business done for the defendant with whom he never had any personal communication.<sup>d</sup> The presence of an attorney, however, at the trial of a cause is not essential.<sup>e</sup> He must discharge his duty to his client.

Where the services rendered are utterly worthless, and the work should plainly not have been undertaken, the attorney cannot recover his bill, although the business was transacted through inadvertence or inexperience, and not with a design of imposing on his client, or from any other improper motives.<sup>f</sup> If an entire item in an attorney's bill be for work *partly useful*, the jury are precluded from reducing it in an action on the bill, but *entire items* for business *entirely useless* may be discarded.<sup>g</sup> If his services are worthless he cannot recover.

\*Where one attorney does business for another, the latter will be liable and not the client, unless he gives express notice that the business is to be done on the credit of the client. An attorney cannot bring an action for the amount of his bill while proceedings are pending on an order to tax it.<sup>h</sup> But a summons to refer a bill for taxation and a judge's order thereon, \*184

<sup>a</sup> *Doe v. Eyton*, 3 B. & Ad. 785. (23 Eng. C. L. 185.)

<sup>b</sup> *Allison v. Rayner*, 7 B. & C. 441. (14 Eng. C. L. 76.)

<sup>c</sup> *Id.* *Gill v. Lougher*, 1 Tyr. 121. 1 C. & J. 170. *Jacks v. Bell*, 3 C. & P. 316. (14 Eng. C. L. 325.) *Hill v. Featherstonhaugh*, 7 Bing. 569. (20 Eng. C. L. 244.)

<sup>d</sup> *Hopkinson v. Smith*, 1 Bing. 13. (8 Eng. C. L. 225.) 7 Moore, 237. *Taylor v. Glasbrook*, 3 Stark. 75. (14 Eng. C. L. 166.)

<sup>e</sup> *Dax v. Ward*, 1 Stark. 409. (2 Eng. C. L. 447.)

<sup>f</sup> *Hill v. Featherstonhaugh*, 7 Bing. 569. (20 Eng. C. L. 244.) 5 M. & P. 541.

<sup>g</sup> *Shaw v. Arden*, 2 M. & Scott, 341. 9 Bing. 287. (23 Eng. C. L. 278.)

<sup>h</sup> *Scrace v. Whittington*, 2 B. & C. 11. (9 Eng. C. L. 7.)

<sup>i</sup> *Sheriff v. Gresley*, (Lady,) 1 H. & W. 588. 5 N. & M. 491.



will not operate as a stay of proceedings in an action on the bill.<sup>a</sup> If unnecessary costs be created through his negligence or ignorance of the law, the court will order the costs to be disallowed on taxation, without prejudicing his right to bring an action for them.<sup>b</sup> An attorney cannot recover for business done in an illegal transaction; but if he prepares a document which is illegal, having reasonable grounds to doubt its legality he will be entitled to recover for it.<sup>c</sup>

## SECTION II.

### WHEN A BILL MUST BE SIGNED AND DELIVERED.

By the statute 3 Jac. I, c. 7, s. 1. attorneys and solicitors are required to give a true bill to their clients of all charges concerning suits, subscribed with their hands and names, &c.

An attorney must deliver his bill a month before action brought.

The 2 Geo. II, c. 23, s. 23, enacts, that no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, charges or disbursements, at law or equity, until the expiration of one month or more after he shall have delivered unto the party to be charged therewith, or left for him at his dwelling-house, or last place of abode, a bill of such fees, charges, and disbursements, written in a common legible hand and in the English tongue, (except law terms and names of writs,) and in words at length, except times and sums which bill shall be subscribed with the proper hand of \*such attorney or solicitor; and upon application of the party chargeable by such bill unto the judge of the court in which the business contained in such bill shall have been transacted, he may refer the bill to be taxed, although no action be depending in such court touching the same.

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The object of the legislature in requiring the delivery of a bill a month<sup>d</sup> before action brought, was to enable the client to examine the charges and have the bill taxed; consequently, a bill which contains no taxable items does not come within the provisions of the act, and need not be delivered. It remains therefore to be considered what are fees, charges, or disbursement, within the meaning of the statute, or in other words, what are taxable items.

It may be observed that the provisions of 3 Jac. I, c. 7, s. 1, are confined to business done in the King's Courts of Record at Westminster. Therefore, where an attorney, both of the

<sup>a</sup> Williams v. Roberts, 1 C. M. & R. 676. 1 Gale, 56. 3 Dowl. 512.

<sup>b</sup> Cliffe v. Prosser, 2 Dowl. 21.

<sup>c</sup> Potts v. Sparrow, 6 C. & P. 749. Tindal. (25 Eng. C. L. 631.)

<sup>d</sup> The month required by the statute is a lunar month. Hurd v. Leach, 5 Esp. 168.

Court of King's Bench and of the Lord Mayor's Court, brought an action against another attorney for business done for him in the latter court; it was held, that the plaintiff was not precluded from recovering by reason of his not having delivered a bill before the commencement of the action, as the whole of the section refers to business done in the superior courts.<sup>a</sup>

It has been held, that an attorney cannot recover for business done at the *quarter sessions*, unless he has previously delivered his bill pursuant to the provisions of the statute, for it is a taxable item.<sup>b</sup> So for business done in the Insolvent Court in procuring the discharge of an insolvent; for it is business done at law.<sup>c</sup> "So taking instructions to commence an action, drawing and engrossing affidavit of debt, attending the swearing the same, and paid for oath."<sup>d</sup> So for attending and examining defendant's proposed bail, and "attending the plaintiff in several actions commenced against the defendant, and arranging with \*him to take cognovits thereon."<sup>e</sup> So for attending at a lock-up house and obtaining defendant's release and *filling up the bail bond*; for it is a charge made by an attorney in the progress of a suit.<sup>f</sup> So for drawing a warrant of attorney and attending defendant respecting it.<sup>g</sup> So for obtaining a bankrupt's certificate or the signature of the Lord Chancellor.<sup>h</sup> So for attesting a replevin bond, or for business done in the county court.<sup>i</sup> So for attending the defendant and advising him, he having been served with a writ after paying the amount of the debt.<sup>j</sup> So for suing out a writ of *dedimus potestatem*.<sup>k</sup> If an attorney who is not admitted in the Court of Bankruptcy, employ an agent who is to strike a docket for

What are  
taxable  
items.

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<sup>a</sup> Reynal v. Smith, 2 B. & Ad. 469. (21 Eng. C. L. 126.) See also Brickwood v. Fanshaw, Carth. 147. Heming v. Wilton, M. & M. 529. (21 Eng. C. L. 376.) 4 C. & P. 318, S. C. (19 Eng. C. L. 403.)

<sup>b</sup> *Ex parte* Williams, 4 T. R. 496. Clarke v. Donovan, 5 *id.* 694. Sylvester v. Webster, 9 Bing. 388. (23 Eng. C. L. 314.) It had been previously decided that such a bill was not taxable. See *ex parte* Williams, 4 T. & R. 124, and the cases in *notis*.

<sup>c</sup> Smith v. Wattleworth, 4 B. & C. 364. (10 Eng. C. L. 358.)

<sup>d</sup> Winter v. Payne, 6 T. R. 645.

<sup>e</sup> Watt v. Collins, R. & M. 284. (24 Eng. C. L. 440.)

<sup>f</sup> Fearne v. Wilson, 6 B. & C. 86. (13 Eng. C. L. 108.)

<sup>g</sup> Sandon v. Bourne, 4 Camp. 68. Wilson v. Gutteridge, 3 B. & C. 157. (10 Eng. C. L. 42.) In the latter case, Burton v. Chatterton, 3 B. & A. 486, (5 Eng. C. L. 353,) was referred to, where it was decided that preparing an affidavit of the petitioning creditor's debt and bond to the chancellor, in order to obtain a commission of bankruptcy, the affidavit not having been sworn nor commission issued, was not an item which required a bill to be delivered. With reference to it the court said, "The point there occurred on the statute as to the necessity of delivering a bill." But we have a paramount jurisdiction independently of the statute, to refer an attorney's bill for taxation." But see Clutterbuck v. Combes, 5 B. & Ad. 400, (27 Eng. C. L. 102,) where the court denied that they had any such authority independently of the statute.

<sup>h</sup> Collins v. Nicholson, 2 Taunt. 321.

<sup>i</sup> Wardle v. Nicholson, 4 B. & Ad. 469. (24 Eng. C. L. 106.) Becke v. Wella, 3 Tyr. 193.

<sup>j</sup> Smith v. Taylor, 7 Bing. 259. (20 Eng. C. L. 125.)

<sup>k</sup> *Ex parte* Prickett, 1 N. R. 266.

him, and after payment of the agent by the official assignee, the attorney, who is the principal, deliver a bill with charges for striking the docket, it is taxable.<sup>a</sup>

Where there are taxable and non-taxable items.

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If an attorney does business of a taxable nature, and other business clearly not so, he is bound to include the whole in one bill which is taxable: he cannot bring an action for non-taxable business alone.<sup>b</sup> It is sufficient to bring the bill within the statute if it contains one taxable item.<sup>c</sup> But where an attorney brought an action without having delivered any bill, but after action brought, delivered a bill of particulars; held, that he was entitled to recover items of charge for money paid for the defendant's use, *having no reference to his business of an attorney*; although other items in the bill of particulars were taxable.<sup>d</sup> If, however, such items, though not taxable, were connected with his business of an attorney, he could not recover.<sup>e</sup> The distinction upon this subject appears to be, that if all the items in the particulars of demand are in respect of business done, or money advanced by the plaintiff in his character of attorney, all would have been taxable, and the whole bill should have been delivered; but if there be any item for business done, or money advanced by the plaintiff *not in that character*, (as if the plaintiff was a banker as well as an attorney, and had advanced money to the defendant in his former character only,) that not being a taxable item, may be sued for though no bill has been delivered."<sup>f</sup>

### SECTION III.

#### WHEN A BILL NEED NOT BE DELIVERED.

AN attorney need not deliver a bill which contains no taxable item.

What items are not taxable.

It has been decided that a charge for preparing an affidavit of the petitioning creditor's debt and bond, to the chancellor, in order to obtain a commission of bankruptcy, is not a taxable item; the affidavit not having been sworn, nor commission issued.<sup>g</sup> So, for obtaining an act of parliament or prosecuting

<sup>a</sup> *Ex parte* Cass, 2 M. & A. 170.

<sup>b</sup> *Thwaites v. Mackerson*, 3 C. & P. 341. (14 Eng. C. L. 337.) *Benton v. Garcia*, 3 Esp. 149. *James v. Child*, 2 Tyr. 732. 2 C. & J. 678. But see *Beck v. Penn*, 7 C. & P. 397.

<sup>c</sup> *Watt v. Collins*, 2 C. & P. 71. (12 Eng. C. L. 33.) *Winter v. Payne*, 6 T. R. 645. *Ex parte* Prickett, *supra*. Per Lord Eldon, *Hill v. Humfreys*, 2 B. & P. 345.

<sup>d</sup> *Mowbray v. Fleming*, 11 East, 285. *Hemming v. Wilton*, M. & M. 529. (21 Eng. C. L. 376.) 4 C. & P. 318. (19 Eng. C. L. 403.) S. C.

<sup>e</sup> *Hill v. Humfreys*, 2 Bos. & P. 343. *Miller v. Towers*, Peake, 102.

<sup>f</sup> Per Littledale, J., in *Wardle v. Nicholson*, 4 B. & Ad. 475. (24 Eng. C. L. 106.)

<sup>g</sup> *Burton v. Chatterton*, 3 B. & A. 486. (5 Eng. C. L. 353.) "But if it had gone

an appeal before the House of Lords.<sup>a</sup> So, for business done under a commission of bankruptcy.<sup>b</sup> Where *A.*, an attorney, \*at the request of *B.*, who was in custody for debt in an action in which *A.* had not been concerned, gave an undertaking for the debt and costs, which he accordingly paid to the plaintiff's attorney without having the costs taxed; held, that this was not a disbursement by *A.* within the meaning of the statute, and that a bill need not be delivered.<sup>c</sup> So, for conveyancing alone.<sup>d</sup> So, charges for searching the warrant of attorney's office, and for a fee paid there, do not make a bill taxable.<sup>e</sup> \*188

An attorney's bill for preparing acknowledgments of married women, and attending before the commissioners, is not taxable.<sup>f</sup>

An attorney employed to transfer stock, found that a *distringas* had been entered at the bank, to prevent the transfer. He thereupon made several inquiries respecting the transactions on behalf of his client, and prepared a notice to the solicitor of the bank to file a bill in consequence of the writ being entered: held, that his charges were not taxable items between him and his client, it not appearing that the *distringas* originated in any writ, or that the business had any reference to any proceeding in court. Patteson, J., said, that if the *distringas* had been in a suit, the steps taken by the plaintiff would form taxable items.<sup>g</sup>

Procuring an appearance to be entered by a proctor in a consistory court, is not a taxable item in an attorney's bill.<sup>h</sup>

The statute 12 Geo. II, c. 13, s. 5, enacts, that the statute 2 Geo. II, c. 23, s. 23, is not to extend to bills due from an attorney or solicitor to another attorney or solicitor or clerk in court.

Where one attorney brought an action against another attorney for business done by the plaintiff before the defendant was admitted an attorney, it was contended that the plaintiff ought to have delivered his bill a month previously, as the defendant was not an attorney when the business was done; but the court held, that the case came within the provisions of the above act, and that the plaintiff might recover though he did not deliver a bill pursuant to the provisions of 2 Geo. II, c. 23, for \*the object and spirit of 12 Geo. II, c. 13, was, that the restrictions of the 2 Geo. II, c. 23, should not be applied where both parties were attorneys, when the action was brought, for A bill need not be delivered for business done by one attorney for another. \*189

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on to the extent of swearing the affidavit, it would have been a proceeding at law or in equity, and therefore taxable." Per Holroyd, J., *id.*

<sup>a</sup> *Williams v. Odell*, 4 Price, 279. *Ex parte Wheeler*, 3 Ves. & B. 21.

<sup>b</sup> *Hamilton v. Pitt*, 7 Bing. 232. (20 Eng. C. L. 114.) *Finchett v. How*, 2 Camp. 278. *Crowder v. Davies*, 3 Y. & J. 433.

<sup>c</sup> *Prothero v. Thomas*, 6 Taunt. 196. (1 Eng. C. L. 355.)

<sup>d</sup> *Tidd*, 329. *Barnes*, 41. *Beck v. Penn*, 7 C. & P. 397. *Tindal*.

<sup>e</sup> *Ex parte Bowles*, 1 Scott, 583. 1 Bing. N. C. 632. (27 Eng. C. L. 522.) 1 *Hodges*, 143.

<sup>f</sup> *In re Branson*, 3 Bing. N. C. 783.

<sup>g</sup> *Nicholas v. Hayter*, 2 Ad. & Ell. 348. (29 Eng. C. L. 116.)

<sup>h</sup> *In re Morris*, 2 Ad. & Ell. 582. (29 Eng. C. L. 163.)

in such case the defendant must be taken to be fully competent to understand the nature of the charges in the bill, and to resist them if exorbitant or improper.<sup>a</sup> So, one attorney as agent for another in the country, has no occasion to deliver his bill signed, a month before he brings his action.<sup>b</sup> The executors or administrators of an attorney need not, before action brought, deliver a bill of costs for business done by the attorney; for the statute is confined to the attorney himself, and does not extend to his personal representatives.<sup>c</sup> So, the assignees of an insolvent attorney need not deliver a bill before action brought, as the obligation imposed by the statutes is personal on the attorney.<sup>d</sup> If a bill has been delivered to a deceased client, it is not necessary, in order to maintain an action against his personal representatives, to deliver another to them.<sup>e</sup> To enable an attorney to set off his bill, he need not deliver it a month before the action was commenced, but he ought to deliver it signed a reasonable time before.<sup>f</sup>

#### SECTION IV.

##### WHAT IS A SUFFICIENT SIGNING AND DELIVERY OF A BILL.

THE bill may contain such abbreviations of English words as are usual and intelligible.<sup>g</sup> It has been held, that such abbreviations as "declon., instrons., confce., afft., atty.," &c., form no objection to the action.<sup>h</sup> It must state the items severally and not charge them in a lump, even though the bill was  
 \*190 \*taxed.<sup>i</sup> It need not specify the court in which the business was transacted.<sup>j</sup>

By whom signed. The statute requires that the bill should be *signed* by the plaintiff, an omission in that respect will be a ground of non-suit.<sup>k</sup> But a bill signed by one member of a firm, has been held sufficient, though the signature did not contain the Christian names of the partners.<sup>l</sup>

<sup>a</sup> Ford v. Maxwell, 2 H. Bl. 589.

<sup>b</sup> Bridges v. Francis, Peake, 1. Jones v. Price, *id.* 2, n. Nelson v. Garsforth, 1 Esp. 221.

<sup>c</sup> Barrett v. Moss, 1 C. & P. 4. (11 Eng. C. L. 296.) 1 Barnard, 433. Sud. 276.

<sup>d</sup> Lester v. Lazarus, 2 C. M. & R. 665. 1 Gale, 317.

<sup>e</sup> Reynolds v. Caswell, 4 Taunt. 193.

<sup>f</sup> Bulman v. Birkett, 1 Esp. 449. Murphy v. Cunningham, 1 Anst. 198.

<sup>g</sup> Reynolds v. Caswell, 4 Taunt. 193.

<sup>h</sup> Frowd v. Stillard, 4 C. & P. 51. (19 Eng. C. L. 268.) Tenterden.

<sup>i</sup> Drew v. Clifford, R. & M. 280. (21 Eng. C. L. 439.) But though the plaintiff cannot recover for a particular item, because it is not sufficiently described in the bill, he may recover for those which are. *Id.*

<sup>j</sup> Lester v. Lazarus, 1 Gale, 317. 2 C. M. & R. 665.

<sup>k</sup> Tomlinson v. Clark, 4 Moore, 4. (16 Eng. C. L. 354.) Weld v. Crawford, 2 Stark. 538. (3 Eng. C. L. 465.)

<sup>l</sup> Smith v. Brown, 1 Tyr. 486. 1 C. & J. 542.

The bill should be delivered to the defendant himself, or his agent expressly authorised by him to receive it.<sup>a</sup> If the bill be delivered to his attorney, and the defendant attends the taxation in person, it amounts to a recognition of the attorney as his agent for receiving the bill.<sup>b</sup> Where a party in a cause having changed his attorney in the progress of it, and a judge's order was afterwards obtained by the second attorney, for the delivery to him of a bill signed by the first attorney: held; that a delivery to the second attorney was sufficient.<sup>c</sup> It is not sufficient to show the bill to the defendant, it should be left with him; for where the bill was delivered to the defendant, and he said he would pay the debt, but that he did not know what to do with the bill, upon which the plaintiff took it back; held, that he could not recover.<sup>d</sup>

To whom  
the bill  
should be  
delivered.

Where an attorney was retained jointly by several parties, to defend a suit against each, in the subject matter of which they were all jointly interested; held, that the delivery of a bill to one of them, who had retained the plaintiff, and took upon himself the management of the business, was sufficient to maintain a joint action against them all for the costs.<sup>e</sup>

The words of the statute are in the alternative, it requires the bill to be delivered to the party, or left for him at his dwelling-house or last place of abode; it has been held, that a \*delivery at the defendant's counting-house was not sufficient.<sup>f</sup> But proof of a delivery at his last known place of abode, will be sufficient to throw upon the defendant the onus of proving that he had a better *known* place of abode.<sup>g</sup> A bill with an indorsement upon it, (March 4th, 1815, delivered a copy to C. D.,) which indorsement was in the hand-writing of a deceased clerk of the plaintiff's, (whose duty it was to have delivered a copy of the bill,) and proved to have existed at the time of the date, was held, by Lord Ellenborough to be sufficient evidence of the delivery of the bill.<sup>h</sup>

At what  
place the  
bill should  
be delivered.

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## SECTION V.

### HOW A BILL MAY BE PROVED.

THE contents of the bill, duly signed and delivered, may be proved by a copy of it, though not signed by the attorney,

<sup>a</sup> Finchett v. How, 2 Camp. 277.

<sup>b</sup> Warren v. Cunningham, Gow, 73. (5 Eng. C. L. 468.)

<sup>c</sup> Vincent v. Slaymaker, 12 East, 372. <sup>1</sup> Brooks v. Mason, 1 H. Bl. 290.

<sup>d</sup> Oxenham v. Lemon, 2 D. & R. 461. (16 Eng. C. L. 103.) Finchett v. How, 2 Campb. 275, S. P. Crowder v. Shee, 1 Campb. 437.

<sup>e</sup> Hill v. Humphrey, 2 B. & P. 343.

<sup>f</sup> Wadeson v. Smith, 1 Stark. 324. (11 Eng. C. L. 410.)

<sup>g</sup> Champneys v. Peake, 1 Stark. 404. (2 Eng. C. L. 445.)



without proof of notice to produce the original; for the bill delivered is in the nature of a notice to the defendant of the amount of the plaintiff's demand, and that he will enforce that demand unless the defendant has the bill taxed; and a notice to produce a notice is not necessary.<sup>a</sup> So they may be proved by a duplicate original.<sup>b</sup> But where no notice to produce the original was given, it was held, that the plaintiff could not prove the contents by reading the items of charge from the books from which the bill was stated to have been copied; for such evidence was inadmissible.<sup>c</sup>

If the bill delivered contains any taxable items, the defendant cannot object to the reasonableness of the charges, for the delay of the defendant for more than a month in objecting to the *quantum*, is an admission that he thinks that reasonable.<sup>d</sup>

- \*192 \*But if the bill be not taxable, evidence as to the reasonableness of the charges must be given, as in other cases. The delivery of a former bill is conclusive evidence of an increase of charge in a subsequent bill, on any of the items contained in it, and strong presumptive evidence against any additional items.<sup>e</sup> The defendant's liability may be proved by proof of his retainer of the plaintiff, or of his undertaking to pay, or of his admission: proof of the judge's order referring the bill to be taxed, with proof of the defendant's undertaking to pay what should appear to be due, and of the master's allocatur, proves the whole of the plaintiff's case. The judge's order, and the master's allocatur, prove the work done and the amount of the charges; the undertaking proves the liability of the defendant.<sup>f</sup>

## SECTION VI.

### DEFENCE.

Negligence is no defence, if

THE defendant cannot set up as a defence, the negligence of the attorney in the conduct of a cause.<sup>g</sup> "I do not go the length of saying, that in no case of this kind can negligence in the party suing, be used as a defence to the action, though I

<sup>a</sup> Colling v. Trewick, 6 B. & C. 394. (13 Eng. C. L. 208.) Fyson v. Kemp, 6 C. & P. 72. (25 Eng. C. L. 287).

<sup>b</sup> Anderson v. May, 2 Bos. & Pul. 237.

<sup>c</sup> Phillipson v. Chayse, 2 Campb. 110.

<sup>d</sup> Hooper v. Till, Doug. 128. Williams v. Frith, *ib.* Anderson v. May, *supra*.

<sup>e</sup> Loveridge v. Botham, 1 Bos. & Pul. 49.

<sup>f</sup> Ley v. Jones, 2 Campb. 496. Phillips v. Roach, 1 Esp. 10. 2 Phillips on Ev. 111. Hellings v. Gregory, 10 Moor, 337. (17 Eng. C. L. 146.) In an action for business done for two partners, if one only is sued, and there is no plea of abatement, the other may be called as a witness for the plaintiff. Fawcett v. Wrathall, 2 C. & P. 305. (12 Eng. C. L. 138.)

<sup>g</sup> Templer v. M'Lachlan, 2 N. R. 136.

think it can only be used where the negligence has been such, any benefit has been derived from the services of the attorney. <sup>\*193</sup> that the party for whom the work was done thereby lost all possibility of benefit from such work."<sup>a</sup> "I consider the correct rule to be, that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence."<sup>b</sup> It is a good defence, that the defendant has not exercised "reasonable diligence and skill," and that the costs sought to be recovered, have been incurred through his inadvertence and want of caution.<sup>c</sup> It is no defence that the attorney neglected to file a plea of nonjoinder in abatement, when instructed to do so, expressly for delay;<sup>d</sup> or that the bill was incurred in suing out a commission of bankruptcy in consequence of a mistaken representation by the plaintiff that it could operate in the Isle of Man.<sup>e</sup>

The defendant may show under the general issue that the attorney agreed to do the business for the money actually disbursed;<sup>f</sup> or gratis.<sup>g</sup>

In assumpsit on an attorney's bill, the defendant may show under non assumpsit, that in consequence of the plaintiff's negligence he derived no benefit from his services, or that the plaintiff had agreed to do the work for nothing.<sup>h</sup>

## SECTION VII.

### PRIVILEGE, AS TO VENUE AND COURT.

An attorney, when plaintiff, may lay and retain the venue in Middlesex.<sup>i</sup> But if he waives his privilege and does not sue as an attorney, but appears by an attorney, the defendant may change the venue on the usual affidavit.<sup>j</sup> Where an attorney is defendant, he has no privilege with respect to venue whatever.<sup>k</sup>

<sup>a</sup> Per Mansfield, C. J., *id.*

<sup>b</sup> Per Lord Ellenborough, in *Farnsworth v. Garrard*, 1 Campb. 39.

<sup>c</sup> *Montrion v. Jefferys*, R. & M. 317. (21 Eng. C. L. 449.)

<sup>d</sup> *Johnson v. Alston*, 1 Campb. 176. "If an attorney puts in a false plea to delay justice, he breaks his oath, and may be fined for putting a deceit upon the court." Per Holt, C. J., in *Pierce v. Blake*, 2 Salk. 515. See 1 Camp. 176, *in notis.*

<sup>e</sup> *Pasmore v. Birnie*, 2 Stark. 59. (3 Eng. C. L. 243.)

<sup>f</sup> *Jones v. Read*, 1 N. & P. 18, *ante.*

<sup>g</sup> *Ashford v. Price*, 3 Stark. 185. (14 Eng. C. L. 176.)

<sup>h</sup> *Hill v. Allen*, 2 Mees. & Wels. 283. 1 Mur. & Hur. 37. See *Hayselden v. Staff*, 2 H. & W. 204. 6 Nev. & Man. 659.

<sup>i</sup> *Pye v. Leigh*, 2 Bl. 1065.

<sup>j</sup> *Harrington v. Page*, 2 Dowl. 164. *Lowless v. Tims*, 3 Dowl. 709.

<sup>k</sup> *Yeardley v. Roe*, 3 T. R. 573. *Pope v. Readfearne*, 4 Burr. 2027.

The uniformity of process act, has not taken away the privilege of an attorney to be sued in his own court.<sup>a</sup>

**Court of Requests.** An attorney is not obliged to sue in a court of requests for a sum within its jurisdiction, unless his privilege be taken away by the express words or necessary construction of the statute creating the court;<sup>b</sup> even since the uniformity of process act;

\*194 \*though he can no longer sue by attachment of privilege.<sup>c</sup> But it had been held, in the court of *C. P.*, that where an attorney sued as a common person, he was not entitled to that privilege.<sup>d</sup>

**Privilege from arrest.** An attorney cannot be arrested, not even when sued jointly with an unprivileged person, since the uniformity of process act, as he may now be served with a copy of the *capias* under which the other person is arrested, pursuant to 2 W. IV, c. 39, s. 4.<sup>e</sup>

## SECTION VIII.

### LIABILITY OF ATTORNEYS ON THEIR UNDERTAKINGS.

ATTORNEYS and solicitors are in general personally responsible, on contracts made by them, in their own names, though relating to proceedings in which they are only professionally concerned; "and if it were otherwise it would obstruct much of the ordinary business of life; for many persons will deal with solicitors and professional men from the confidence they have in their known character and situation in life, who will not deal with an unknown client."<sup>f</sup>

But the undertaking of an attorney cannot be summarily enforced, unless he is acting as attorney in the cause.<sup>g</sup>

Where the solicitors of the assignees of a bankrupt tenant, on whose lands a distress had been levied by the landlord, gave a written undertaking in the following terms:—"We, as solicitors to the assignees, undertake to pay to the landlord his rent, provided it do not exceed the value of the effects distrained;"—it was held, that they were personally liable, for if they were not liable nobody else was; they had no power as solicitors to pledge the credit of their clients, consequently they could not as solicitors bind the assignees.<sup>h</sup>

<sup>a</sup> *Lewis v. Ker*, 2 Mees. & Wels. 226. 1 Mur. & Hur. 4.

<sup>b</sup> *Johnson v. Bray*, 5 Moore, 622. 2 B. & B. 698. (6 Eng. C. L. 319.) *Gould v. Colyer*, 1 Smith, 334. *Board v. Parker*, 7 East, 48.

<sup>c</sup> *Wright v. Skinner*, 4 Dowl. 745. 1 M. & W. 144. 1 Gale, 378. *Dyer v. Levy*, 4 Dowl. 630. 1 H. & W. 640.

<sup>d</sup> *Tagg v. Madan*, 1 B. & P. 629. *Parker v. Vaughan*, 2 *id.* 29.

<sup>e</sup> *Pitt v. Pocock*, 2 C. & M. 146. 4 Tyr. 85. *Keep v. Biggs*, 2 Dowl. 278.

<sup>f</sup> *Per Abbott, C. J.*, in *Burrell v. Jones*, 3 B. & A. 49. (5 Eng. C. L. 223.)

<sup>g</sup> *In re Bateman*, 2 Dowl. 161.

<sup>h</sup> *Burrell v. Jones*, 1 B. & A. 47.

So, where the respective attorneys for the prosecutor and defendants, on an indictment against a parish for not repairing \*a road, entered into an agreement by which the attorney for the prosecutor agreed that the recognisances should be respited, and the attorney on the part of the parish agreed to pay the cost; this agreement was held to be personally binding on the latter.\*

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So, where the respective attorneys for the plaintiff and defendant in a horse cause, which was ready for trial, but had been withdrawn at the assizes, signed the following undertaking and agreement:—"We, the undersigned, attorneys for the above named plaintiff and the above named defendant, do hereby personally consent, undertake, and agree that the record in this case shall be withdrawn; that the above named defendant shall take back again the horse in the pleadings in this case named, and shall pay the sum of 64*l.* 17*s.* to the above named plaintiff; that the costs of the suit on the part of the defendant shall be taxed between the parties, on the principle between plaintiff and defendant; and that such taxation shall be made and perfected by," &c.—It was held that the plaintiff's attorney in the original action, was personally liable upon this undertaking to pay to the defendant's attorney the costs, when taxed pursuant to the agreement.<sup>b</sup>

The solicitor of the London creditors of a bankrupt in the country, wrote to *B.*, the solicitor of the country creditors of the same bankrupt, the following letter:—"I am willing on behalf of the London creditors to bear two-thirds of the expense of Messrs. *B. & B.*, or such barrister as you may think fit, for resisting Mr. *K.*'s proof under the commission, and of investigating the accounts of the assignees, at the meeting on the 18th instant. I do hereby undertake to bear and pay on behalf of these creditors, two-thirds of the expenses incident thereto, accordingly;" and the meeting being afterwards adjourned, *A.* wrote to *B.* another letter, in which he said, "I shall have no objection to bear as before, the proportion of expenses of the barrister attending the meeting stated in your letter."—it was held, that *A.* was personally liable for the proportion of the expenses.<sup>c</sup>

An attorney is not liable to pay the expenses of a witness whom he has subpoenaed to give evidence at a trial, without an express agreement to that effect.<sup>d</sup>

<sup>a</sup> *Watson v. Murrell*, 1 C. & P. 307. (11 Eng. C. L. 401.)

<sup>b</sup> *Iveson v. Conington*, 1 B. & C. 160. (8 Eng. C. L. 50.) 2 D. & R. 307.

<sup>c</sup> *Hall v. Ashurst*, 1 C. & M. 714. 3 Tyr. 420.

<sup>d</sup> *Robins v. Bridge*, Exchequer, M. T. 1837.

## \*SECTION IX.

## LIABILITY OF ATTORNEYS FOR NEGLIGENCE.

AN action of assumpsit, or on the case,\* will lie at the suit of a client against an attorney, for misconduct, negligence, or unskilfulness in the discharge of his professional duties; for the law implies an undertaking on the part of an attorney, that he will execute the business entrusted to his professional management with a reasonable degree of skill and attention. (1)

An attorney is only bound to use reasonable skill and diligence in conducting the business of his client.

But he is liable for the consequence of ignorance, and for the mismanagement of a cause.

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It is not, however, every mistake, neglect, or misapprehension of an attorney, that will render him liable to an action for negligence; for he is only bound to use *reasonable care and skill* in managing the business of his client; there must be *lata culpa* or *crassa negligentia*, or gross ignorance, to render him responsible.<sup>b</sup> "It would be extremely difficult to define the exact limits by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia* or *lata culpa*, mentioned in some of the cases for which he is undoubtedly responsible. The cases, however, appear to establish that he is liable for the consequences of ignorance or non-observance of the rules of practice of his court; for want of care in the preparation of the cause for trial, or of attendance with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession; whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice and doubtful construction, \*or of such as are usually entrusted to men in the higher branch of the profession of the law. His liability, therefore, must depend on the nature or description of the mistake or want of skill which he has manifested; and he cannot shift from himself such responsibility by consulting another, where the law would presume him to have the knowledge himself."<sup>c</sup>

\* "It appears to me that there is not any substantial distinction between an action of assumpsit founded on a promise which the law implies, that a party will do that which he is legally liable to perform, and an action on the case, which is founded expressly upon a breach of duty." Per Bayley, J., in *Howell v. Young*, 5 B. & C. 266. (11 Eng. C. L. 222.)

<sup>b</sup> *Pitt v. Yalden*, 4 Burr. 2060. *Laidler v. Elliott*, 3 B. & C. 738. (10 Eng. C. L. 219.) 5 D. & R. 635. *Russell v. Palmer*, 2 Wils. 325.

<sup>c</sup> Per Tindal, C. J., in *Godefroy v. Dalton*, 6 Bing. 461. (19 Eng. C. L. 136.) 4 M. & P. 149.

(1) (*Varnum v. Mustin*, 15 Pick. 440. *Stimpeon v. Sprague*, 6 Greenleaf, 470. *Crocker v. Hutchinson*, 1 Vermont, 73.)

Where an attorney for the plaintiff suffered the cause to be called on without previously ascertaining whether a material witness, whom the plaintiff had undertaken to bring into court, had arrived, in consequence of which the plaintiff was non-suited; in an action against the attorney for negligence, the Lord Chief Justice left it to the jury to say, whether, under the circumstances, the defendant had used reasonable care and diligence in conducting the cause; and the jury having found in the negative, the court refused to disturb the verdict. Abbott, C. J. observed, that it was the duty of the defendant not to suffer the cause to be called on, unless he had previously ascertained that all his witnesses were present.<sup>a</sup>

He should secure the attendance of witnesses.

Assumpsit against an attorney for negligence. The plaintiff having purchased an estate, employed the defendant to investigate the title thereto, who, in taking the opinion of counsel thereon, omitted to state in the case certain deeds materially affecting the title; the plaintiff, on the faith of the opinion of counsel (which would have been different had all the deeds been stated) concluded the purchase, whereby he was afterwards damnified on account of the title being imperfect; held, upon those facts, that the jury were justified in coming to a conclusion that the defendant was guilty of a species of negligence sufficient to make him liable in this action, for it was his duty to state the deeds to counsel, otherwise he must draw conclusions at his peril.<sup>b</sup>

Investigation of title.

So for not entering and docketing a judgment within a \*reasonable time, whereby the presumption arose that the debt was satisfied.<sup>c</sup> If an attorney pays into his bankers' hands money of his clients, mixing it with his own, and the bankers fail, the attorney is liable to make good the loss.<sup>d</sup> Where the plaintiff employed the defendants as attorneys to conduct an ejectment for the recovery of premises forfeited by a breach of covenant to repair on the part of the tenant, and it was referred to an arbitrator to decide what repairs were necessary; the defendants having neglected to attend before the arbitrator, the plaintiff was obliged to pay the defendants' costs incurred in the ejectment instead of the tenant: held, that an action was maintainable for such negligence.<sup>e</sup> Neglecting to charge a prisoner in execution within due time, whereby he was superseded, will subject an attorney to an action by the creditors.<sup>f</sup>

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<sup>a</sup> *Reece v. Rigny*, 4 B. & A. 202. (6 Eng. C. L. 401.)

<sup>b</sup> *Ireson v. Pearman*, 3 B. & C. 799. (10 Eng. C. L. 232.) The executrix of an attorney is liable in an action on the case for the negligence of her testator, in not making due inquiry into the validity of a security upon which his client proposed to advance money. *Wilson v. Tucker*, 3 Stark. 154. (14 Eng. C. L. 174.)

<sup>c</sup> *Flower v. Bolingbroke*, 1 Stra. 639.

<sup>d</sup> *Robinson v. Ward*, 2 C. & P. 59. (12 Eng. C. L. 28.) R. & M. 274. (21 Eng. C. L. 433.)

<sup>e</sup> *Swannell v. Ellis*, 1 Bing. 347. (8 Eng. C. L. 341.)

<sup>f</sup> *Pitt v. Alden*, 4 Burr. 2060.



He is not liable for a mistake in a point of law upon which a reasonable doubt may be entertained.<sup>a</sup>

The solicitor under a commission of bankruptcy is not liable in the first instance to a messenger whom he nominates for his bill of fees; but if the solicitor agrees with the petitioning creditor to work a commission for a sum certain, and receives a great part of that sum, he will be liable to such messenger.<sup>b</sup>

Purchasing an annuity.

Where an attorney was employed to purchase an annuity deed, which by reason of subsequent decisions proved defective in point of form; held, that he was not liable to an action for negligence in not discovering the defect to his employer, since at the time of the assignment the deed might be considered sufficient, without any culpable negligence.<sup>c</sup>

\*199 Where an attorney was sued for negligence in allowing judgment to go by default in an action which the plaintiff employed him to defend; the court held, that it was not incumbent on the plaintiff to show that he had a good defence, and that he was damnified by the judgment by default; it was for the attorney to show that fact in his defence if he could; for it was his duty to have pleaded the general issue.<sup>d</sup>

In an action for negligence against an attorney for not causing an application to be made to the court to set aside proceedings in an action brought against the plaintiff, on the ground that he had never been served with a process; in consequence of which neglect, judgment was signed against the plaintiff by default, and afterwards final judgment was sued out, and execution issued thereupon; held, that it was incumbent on the plaintiff to produce an examined copy of the record to prove both the judgments, and that proof of the entry of the judgment by default in the prothonotaries' book, and the inquiry with the prothonotary's allocatur, were not sufficient evidence of such judgment.<sup>e</sup>

Abandoning a cause without due notice.

If an attorney abandons a cause which he has undertaken without giving his client reasonable notice, he will be liable for any damages which his client may have thereby sustained. Therefore, where an attorney, who was retained to conduct a cause at the assizes, gave notice to his client on the Saturday before the commission day, (which was on a Thursday,) that he would not deliver briefs unless he was furnished with funds for counsel's fees; they not being furnished, counsel were not instructed, and a verdict passed against the client. It was held, in an action against the attorney for negligence, that the jury

<sup>a</sup> Kemp v. Burt, 4 B. & Ad. 424. (24 Eng. C. L. 93.) 1 Nev. & M. 262. Laidler v. Elliot, 3 B. & C. 738. (10 Eng. C. L. 219.)

<sup>b</sup> Hartop v. Jukes, 2 M. & S. 438.

<sup>c</sup> Baikie v. Chandless, 3 Campb. 17.

<sup>d</sup> Godefroy v. Jay, 7 Bing. 413. (20 Eng. C. L. 183.) 5 M. & P. 284. If diligence would be ineffectual, the defendant must prove it. Bourne v. Diggles, 2 Chitt. 311. (18 Eng. C. L. 348.) If the defendant in plea denies negligence, the plaintiff must prove it. Shilcock v. Passman, 7 C. & P. 289. (32 C. L.)

<sup>e</sup> Godefroy v. Jay, 1 M. & P. 236. (17 Eng. C. L. 177.) 3 C. & P. 192. (14 Eng. C. L. 265.)

were properly directed to find for the plaintiff, if they thought the attorney had not given reasonable notice to the client of his intention to abandon the cause.<sup>a</sup>

Where attorneys, employed by a vendor to settle on his part the assignment of a term, allowed him to execute an unusual covenant, without explaining the liability thereby incurred; held, that they were responsible to him for the consequent loss, though at the time of the assignment he was himself aware of the fact in respect of which he afterwards incurred liability on \*his covenant.<sup>b</sup> So where an attorney, being employed to raise money on mortgage for the plaintiff, disclosed to the proposed lender certain defects in the plaintiff's title, whereby the plaintiff was subjected to different actions at the suit of the proposed lender, who was led to believe, from the disclosures made by the attorney, that he himself had a legal right to the premises on the security of which the plaintiff proposed to raise the money; held, that the attorney was liable to an action at the suit of the plaintiff for breach of duty, although he had been the attorney of the proposed lender before his retainer by the plaintiff; for it was the first duty of an attorney to keep the secrets of his clients, and the defendant was clearly guilty of a breach of such duty, whereby the plaintiff sustained a temporal injury. It was immaterial whether the disclosures which he had made were such as he would not be privileged to withhold if called upon as a witness or not. If the attorney thought he had a conflicting duty towards his several employers, (as he was the attorney of both parties,) the proper course for him to pursue, would be, to deliver back the deeds to the plaintiff, and to consider his lips sealed with a secret silence, as to the whole of their contents.<sup>c</sup>

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Disclos-  
ing the se-  
crets of a  
client.

The declaration should state that the defendant was retained for reward, or that he was retained at his request, or that he was retained as an attorney, which of itself implies a consideration. The de-  
claration.

Where a declaration in assumpsit for negligence against an attorney, alleged, that in consideration that the plaintiff would retain and employ the defendant in investing money in the purchase of an annuity, the defendant undertook to perform his duty in the premises; that the plaintiff did retain and employ him, but defendant did not do his duty in the premises; but on the contrary, took an insufficient security for the payment of the annuity, whereby the plaintiff lost the money; held, on a motion in arrest of judgment, that the count was bad, as it did not state that any reward was to be paid to the defendant, or that he was employed in any particular character, so as to make \*him responsible for taking a bad security, although not guilty of negligence or dishonesty. Abbott, C. J.:

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<sup>a</sup> Hoby v. Built, 3 B. & Adol. 350. (23 Eng. C. L. 91.)

<sup>b</sup> Stannard v. Ullithorne, 10 Bing. 491. (25 Eng. C. L. 212.) 4 M. & Scott, 359.

<sup>c</sup> Taylor v. Blacklow, 3 Bing. N. C. 235. (32 C. L.)

"In this count the defendant is not alleged to be an attorney, and therefore any duty that would arise from that character cannot be attributed or imposed on him under the present declaration. The word *retained* by no means imports that he was an attorney."<sup>a</sup> But in an action against an attorney for non-feasance in not looking properly into a title, it is sufficient to state that he was retained as an attorney without stating the consideration.<sup>b</sup> Where the declaration stated that the plaintiff retained the defendant, being an attorney, to ascertain whether a certain security was good, that the defendant accepted such retainer, and that it became his duty to ascertain if the security was sufficient; breach, that he did not use due care and diligence, but that he falsely represented the security to be sufficient, whereupon the plaintiff lent money; that the security was not sufficient, by reason whereof the plaintiff has lost the interest of his money, and was likely to lose the principal; it was held sufficient.<sup>c</sup>

## SECTION X.

### LIABILITY OF ATTORNEYS TO THIRD PARTIES FOR MISCONDUCT.

WE have seen that an attorney is liable to his client for misfeasance, negligence, or unskilfulness; it may be further observed, that he is also liable in case or trespass to other parties for any injury which they may sustain by his misconduct in his professional capacity.<sup>d</sup>

\*202 An attorney is liable for the consequences of suing out an illegal process. \*Where an attorney sued out an illegal writ of *ca. sa.* against a defendant, and caused her to be arrested and imprisoned, it was held that an action of trespass for false imprisonment lay, as well against the attorney as against his client; for though an attorney is not chargeable to the defendant for bringing an action, be it ever so groundless or vexatious, for therein he pursues his instructions, and the plaintiff only knows the true merits, yet in the conduct of a cause, if he does an injury to the

<sup>a</sup> Dartnall v. Howard, 4 B. & C. 345. (10 Eng. C. L. 351.) See Whitehead v. Greetham, 2 Bing. 464. (9 Eng. C. L. 483.)

<sup>b</sup> Bourne v. Diggles, 2 Chitt. 311. (18 Eng. C. L. 348.) It is unnecessary to state that the defendant is an attorney of a particular court, but if stated, it must be strictly proved, though the defendant put in his plea as such. *Id.* Green v. Jackson, Peake, 237.

<sup>c</sup> Howell v. Young, 5 B. & C. 259. (11 Eng. C. L. 219.) In an action against an attorney for suffering *B.*, who was in custody at the suit of the plaintiff, to be superseded, it was averred that *B.* was *indebted* to the plaintiff; it having appeared that *B.* was a married woman, it was held a fatal variance. Lee v. Ayrton, Peake, 119.

<sup>d</sup> A writ of deceit will lie against an attorney for acting wrongfully in his character of attorney to the damage of another. F. N. B. *Writ of Deceit*, 217. Per De Grey, C. J., 3 Wils. 377.

defendant by suing out a void process, an action on the case will lie at common law (for the writ of deceit was added by stat. Ed. I.) in case the injury be done to his *property*. And of course if the injury be to the person, trespass will lie against him.<sup>a</sup>

So where a party was arrested under a writ of *ca. sa.*, and afterwards tendered the debt and costs to the plaintiff's attorney, and requested him to sign an authority to the sheriff to discharge him, which the attorney refused to do; held, that an action on the case for having maliciously refused to sign an order for the discharge lay against the attorney and his client; for it was the duty of the attorney to accept the debt and costs, and give an authority to the sheriff to discharge the party.<sup>b</sup>

Wrongful detention of a prisoner.

So where an attorney, at the instance of a creditor, directed his agent to sue out a process in the county court against a debtor, and before the return of the process, the debtor paid the debt and costs to the attorney; but the agent being ignorant of that fact, entered up judgment in the county court and sued out execution, under which the goods of the debtor were seized; held, that the attorney and the creditor were liable as trespassers.<sup>c</sup>

Wrongful seizure of goods.

But if an attorney acts *bonâ fide* and does not transgress the strict line of his duty, he is not liable in a joint action of trespass with his client.<sup>d</sup> Where *A.* employed an attorney to invest money for him, who advanced it on mortgage to *B.*, and having subsequently discovered that the security was bad, he sued out a bailable process against *B.* in *A.*'s name, without the knowledge of *A.*; held, that as the attorney had acted *bonâ fide*, and as *A.* had approved of his conduct, *B.* could not maintain an action against the attorney for having arrested him without the authority of *A.*<sup>e</sup>

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A defendant, on whose application a judgment has been set aside for irregularity in practice without costs, cannot recover the costs which he thereby incurred as damages in an action of trespass against the plaintiff's attorney for taking his goods under color of the judgment; for the court have jurisdiction to say definitively, whether there shall or shall not be costs, and if costs might be recovered in this case, actions might be brought for costs after the court had refused to allow them.<sup>f</sup>

Costs.

<sup>a</sup> *Barker v. Braham and another*, 2 Bl. 866. 3 Wils. 368, S. C.

<sup>b</sup> *Crozer v. Pilling*, 4 B. & C. 26. (10 Eng. C. L. 271.)

<sup>c</sup> *Bates v. Pilling*, 6 B. & C. 38. (13 Eng. C. L. 104.)

<sup>d</sup> *Sedley v. Sutherland*, 3 Esp. 202.

<sup>e</sup> *Anderson v. Watson*, 3 C. & P. 214. (14 Eng. C. L. 274.)

<sup>f</sup> *Loton v. Devereux*, 3 B. & Ad. 343. (23 Eng. C. L. 89.)

\*traders liable to become bankrupt: provided, that no farmer,\* grazier, common laborer, or workman for hire, receiver gene-

sold afterwards; *Paul v. Dowling*, 3 C. & P. 500. (14 Eng. C. L. 412.) Should a person purchase timber although not cut down, with an intention of making profit by afterwards selling it, he renders himself subject to the bankrupt laws; *Holroyd v. Gwynne*, 2 Taunt. 178. But if a man sells only the timber which he has cut down upon his own estate, he is not within the statute. Where a person purchases milk for the purpose of afterwards selling it, with a view of making profit, he is thereby a trader within the bankrupt laws; but not so, where he disposes only of such milk as he is supplied with by his own cows, though he may sometimes sell these cows, which are no longer in a condition to supply milk; *Carter v. Dean*, 1 Swan, 64. Where a man, with the intention of making a profit, buys and sells again cider or cheese, he may be made a bankrupt; but he is not a trader where he merely sells such cheese as has been made out of the milk of his own cows, or the cider made of the fruit of his own trees; per Lord Mansfield, in *Parker v. Wells*, 1 T. R. 34. Where a man purchases with the intention of selling again, and thereby making profit, the entire impression of a daily paper, and thus exposes himself to the loss of those which he not disposed of, he is a trader within the meaning of the statute; *Gillingham v. Laing*, 2 Marsh. 236. 6 Taunt. 532. (1 Eng. C. L. 476.) A person who keeps livery stables, and buys large quantities of hay and straw and oats, which he supplies to the horses standing in the stables, and sells to any person generally, is a trader subject to the bankrupt laws; *Cannan v. Denew*, 3 M. & Scott, 761. 10 Bing. 292. (25 Eng. C. L. 139.)

A person is not a trader by such occasional acts as a schoolmaster selling books to his own scholars only, *Valentine v. Vaughan*, Peake, 76; a contractor for victualling the fleet selling off the surplusage, *Gibbons v. Thompson*, 1 Vent. 270. A colonel of a fencible regiment, selling horses occasionally at Tattersall's, *Exp. Blackmore*, 6 Ves. 3; or a person who keeps hounds buying dead horses and selling the skins and bones, *Summersett v. Jarvis*, 3 Brod. & Bing. 2. (7 Eng. C. L. 322.) 6 Moore, 56. So, if a person finding that he has bought more of an article than he wants, sell the residue, it will not make him a trader; *Bolton v. Sowerby*, 11 East, 276.

In order to make a man liable to be a bankrupt, "by buying and selling, or by the workmanship of goods or commodities," it is necessary that there should have been a repeated practice of it, or a commencement of it, coupled with an intention to continue it; for a single act of buying and selling unaccompanied with such intention will not be sufficient; *Cooke*, 64. Arch. 41.

The illegality of the business is no objection to a commission. A trader may become a bankrupt, although he has not taken out a license necessary to legalise his trade; *Saunderson v. Bowles*, 4 Burr. 2066. *Martin v. Nightingale*, 11 Moore, 305. (13 Eng. C. L. 33.) Even a smuggler may become a bankrupt; *Ex parte Meymot*, 1 Atk. 169. *Cobb v. Symonds*, 1 D. & R. 111. 5 B. & A. 516. (7 Eng. C. L. 179.) But the bankrupt buying in connection with others, to carry on a system of fraud, without any evidence of selling in the way of business, is not a trading within the statute; *Millikin v. Brandon*, 1 C. & P. 380. (11 Eng. C. L. 426.) Where a country attorney hired a room in London, which he kept four weeks, in which he put a number of old books, sticking up a paper in the window in which his name was written, with the addition of "bookseller," a fiat having issued against him by this description, it was annulled on the ground of fraud; *Ex parte Dart*, 2 D. & C. 543. Although there be no evidence of trading on the proceedings, the fiat will not be superseded if the bankrupt admitted to the petitioning creditor that he was a trader; *Ex parte Bailey*, 2 M. & A. 86.

\* Though a farmer is not liable as such to become bankrupt, yet if he follows any business distinct and separate from that of a farmer, with a view to make profit thereby, he is a trader within the meaning of the statute; as where a farmer every now and then bought a horse which was not calculated for the farming business, and constantly sold it again, so that within the course of two years he had bought and sold five or six horses in this manner, two of which had been sold directly after he had bought them for the sake of a guinea profit, it was held that he was a trader. *Bartholomew v. Sherwood*, 1 T. R. 537, n. *Wright v. Bird*, 1 Price, 20, S. P. So where a farmer purchased a large quantity of potatoes, not to be used on his farm, but merely to sell



ral \*of the taxes, or member of or subscriber to any incorporated, commercial, or trading companies established by char-

again for profit. *Mayo v. Archer*, 1 Stra. 513. But if he buys horses, pigs, or other stock, with a view to a resale of them, as ancillary to the profitable occupation of his farm, he does not thereby become a trader. See *Patten v. Brown*, 7 Taunt. 409. (2 Eng. C. L. 157.) *Stewart v. Ball*, 2 N. R. 78. *Bolton v. Sowerby*, 11 East, 274. A single act of buying and selling by a farmer with evidence of an intent to continue, is sufficient to constitute him a trader. *Ex parte Lavender*, 4 Dea. & Ch. 487. 2 M. & A. 11.

By sec. 135, aliens, denizens and women are included within the provisions of the Act, so as to make them subject thereto, and to entitle them to all the benefits given thereby.

The 21 Jac. I, c. 19, s. 15, (now repealed) contained a similar provision respecting aliens and denizens, and under that Act it was decided that aliens or persons residing in Ireland, *Dodsworth v. Anderson*, Sir Thomas Raym. 375; or Scotland, *Alexander v. Vaughan*, Cowp. 398; or in the British colonies, *ex parte Smith*, cited in Cowp. 402; or in the Isle of Man, *Allen v. Cannon*, 4 B. & A. 418; (6 Eng. C. L. 470;) or in any foreign country, *Bird v. Sedgwick*, 1 Salk. 110, trading to and from this country; buying goods here and sending them abroad for sale, or buying them abroad and sending them here for sale, might, if they came to England and committed an act of bankruptcy, be made bankrupts.

*Women.*—There can be no doubt that a feme sole (independently of this provision) is equally as liable as a man to become bankrupt, but a married woman cannot be a subject of the bankrupt laws, except in those cases in which, according to the principle laid down in *Marshall v. Rutton*, 8 T. R. 546, her coverture would not be a good plea in actions against her upon her contracts in trade. See *ex parte Mear*, 2 Bro. C. C. *Preston v. Green*, Cooke, 40. A feme covert, who is a sole trader according to the custom of London, may be a bankrupt. *Lavie v. Phillips*, 3 Burr. 1776, 1 Bl. 570. *Ex parte Carrington*, 1 Atk. 206. So may the wife of a convict sentenced to transportation, although her husband be on board the hulks, and she has occasional intercourse with him. *Ex parte Franks*, 7 Bing. 762. (20 Eng. C. L. 323.)

A *Lunatic* may become a bankrupt if the act of bankruptcy be committed during a lucid interval. *Anon.* 13 Ves. 590. *Ex parte Ridley*, Cooke, 48. But a commission of bankruptcy against an infant is void, and not merely voidable. *Bilton v. Hodges*, 9 Bing. 365. (23 Eng. C. L. 309.) Nor can a person become a bankrupt by reason of trading by him during his infancy. *Stevens v. Jackson*, 4 Campb. 164. *Ex parte Adam*, 1 Ves. & B. 494. *O'Brien v. Currie*, 3 C. & P. 283. (14 Eng. C. L. 307.) But where an infant held himself out as an adult, and had traded as such for two years, the court refused to supersede a commission of bankrupt sued out against him, but left him to his action. *Ex parte Watson*, 16 Ves. 265. The court of review superseded a fiat with costs to be paid by the petitioning creditor, on the ground that the bankrupt was a minor. *Ex parte Helior*, 3 Deac. & Chitt. 107.

*Clergymen*, though prohibited by statute from entering into trade, may become bankrupt. *Hankey v. Jones*, Cowp. 745. *Ex parte Meymot*, 1 Atk. 196. So may peers and members of parliament, *id.*; and excisemen if they are traders. *Highmore v. Molloy*, 1 Atk. 206.

A second fiat in bankruptcy against a trader before a former fiat is disposed of, or before he obtains his certificate, is a nullity. *Martin v. O'Hara*, Cowp. 824. Therefore, where a bankrupt obtained a certificate under a second commission issued under such circumstances, the Court of King's Bench refused to discharge him out of custody, though the debt for which he was detained had been contracted before the issuing of the commission. *Till v. Wilson*, 7 B. & C. 684. (14 Eng. C. L. 110.)

An *Executor*, who carries on business for the benefit of the testator's children, may become bankrupt in respect of such business. *Vines v. Cadell*, 3 Esp. 88. *Ex parte Garland*, 10 Ves. 110. Where a testator disposed of his property, and directed a trade in which he was concerned to be carried on after his death; held, that only his capital in trade was liable to debts incurred after his death. *Ex parte Richardson*, 3 Madd. 138; and see *Thompson v. Andrews*, 1 Myl. & K. 116. But the merely selling of the stock in trade of a testator will not subject an executor to the bankrupt laws, though



ter \*or act of parliament, shall be deemed, as such trader, liable by virtue of this act to become bankrupt.

## WHAT CONSTITUTES AN ACT OF BANKRUPTCY.

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Departing the realm, absenting. \*210 Beginning to keep house, &c.

1.—*Statutory provisions.*] THE 6 Geo. IV, c. 16, s. 3, enacts, that if any such trader shall depart this realm, or being sent out of this realm shall remain abroad, or \*depart from his dwelling-house, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested, or his goods, money, or chattels to be attached, sequestered, or taken in execution, or make or cause to be made, either within this realm, or elsewhere, any fraudulent grant or conveyances of any of his lands, tenements, goods or chattels, or make or cause to be made, any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made, any fraudulent gift, delivery, or transfer of any of his goods or chattels; every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made any of the acts, deeds or matters aforesaid, with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy.

Convey-  
ance of all

Sec. 4 enacts that where any such trader shall execute any conveyance or assignment, by deed, to a trustee or trustees, of

he purchase articles to mix with it in order to make it saleable. *Ex parte Nutt*, 1 Atk. 102. *Cooke*, 78.

Though a trader retires from business, yet he is liable to be made a bankrupt in respect of debts incurred while in trade. *Doe v. Lawrence*, 2 C. & P. 134. (12 Eng. C. L. 58.) *Ex parte Bamford*, 15 Ves. 449. So is a trader who has ceased to buy, but is selling off his stock, if he has an intention to resume the trade, which is a question for the jury. *Ex parte Patterson*, 1 Rose, 402. If a trader ceases to manufacture, but still solicits orders, and executes them, he is liable to be made a bankrupt. *Wharam v. Routledge*, 5 Esp. 235. *A.*, not a trader, was indebted to *B.* in 100*l.* He afterwards became a trader, and after he had ceased to trade he committed an act of bankruptcy; held, that a commission might be supported on *B.*'s debt. *Baillie v. Grant*, 9 Bing. 121. (23 Eng. C. L. 276.) But evidence of a trading which ceased before 6 Geo. IV, c. 16, came into operation, will not support a commission of bankrupt if sued after that time. *Surtees v. Ellison*, 9 B. & C. 750. (17 Eng. C. L. 491.) *Palmer v. Moore*, *id.* 754, *n.* *Ex parte Batten*, M. & M'A. 287.

all his estate and effects, for the benefit of all the creditors of a trader's such trader, the execution of such deed shall not be deemed property an act of bankruptcy, unless a commission issue against such not an act of bankruptcy, by such trader within six calendar months from the execution thereof by such trader; provided that such deeds shall be executed by every such trustee within fifteen days after the execution thereof by the said trader, and that the execution by such trader, and by every such trustee be attested by an attorney or solicitor; unless a fiat issue within six months. and that notice be given within two months after the execution thereof by such trader, in case such trader reside in London, or within forty miles thereof, in the London Gazette, and also in two London daily newspapers; and in case such trader does not reside within forty miles of London, then in the London Gazette, and also in one London daily newspaper, and one provincial newspaper published near to such trader's residence; and such notice shall \*contain the date and execution of such deed, and the name and place of abode respectively of every such trustee, and of such attorney or solicitor. \*211

By sec. 5. If any such trader, having been arrested or committed to prison for debt, or on any attachment for non-payment of money, shall, upon such or any other arrest or commitment for debt, or non-payment of money, or upon any detention for debt, lie in prison for twenty-one days, or having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him, and not discharged, every such trader shall be thereby deemed to have committed an act of bankruptcy; or if any such trader, having been arrested, committed, or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention. Escape out of prison.

By sec. 6. If any such trader shall file in the office of the Lord Chancellor's secretary of bankrupts, a declaration in writing, signed by such trader, and attested by an attorney or solicitor, that he is insolvent or unable to meet his engagements, the said secretary of bankrupts, or his deputy, shall sign a memorandum that such declaration hath been filed, which memorandum shall be authority for the printer of the London Gazette, to insert an advertisement of such declaration therein; and every such declaration shall, after such advertisement inserted as aforesaid, be an act of bankruptcy committed by such trader at the time when such declaration was filed; but no commission shall issue thereupon, unless it be sued out within two calendar months next after the insertion of such advertisement, and unless such advertisement shall have been inserted in the London Gazette within eight days after such declaration was filed; and no docket shall be struck upon such act of bankruptcy before the expiration of four days next after insertion of such advertisement, in case such commission is to Declaration of insolvency to be an act of bankruptcy.

be executed in London, or before the expiration of eight days next after such insertion, in case such commission is to be executed in the country; and the Gazette containing such advertisement shall be evidence to be received of such declaration having been filed:

\*212

Concerted  
declara-  
tion.

By sec. 7. No commission under which the adjudication shall be grounded on the act of bankruptcy, being the filing of such declaration, shall be deemed invalid by reason of such declaration having been concerted or agreed upon between the bankrupt and any creditor or other person.

Trader  
com-  
pounding  
with peti-  
tioning  
creditor to  
be an act  
of bank-  
ruptcy.

By sec. 8. If any such trader, liable by virtue of this act to become bankrupt, shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give and deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound in respect of his debts than the other creditors, such payment, gift, delivery, satisfaction, or security, shall be an act of bankruptcy; and if any commission shall have issued upon the docket so struck as aforesaid, the Lord Chancellor may either declare such commission to be valid, and direct the same to be proceeded in, or may order it to be superseded, and a new commission may issue, and such commission may be supported either by proof of such last-mentioned, or of any other act of bankruptcy; and every person so receiving such money, gift, delivery, satisfaction, or security as aforesaid, shall forfeit his whole debt, and also repay or deliver up such money, gift, satisfaction, or security as aforesaid, or the full value thereof, to such person or persons as the commissioners acting under such original commission, or any new commission, shall appoint, for the benefit of the creditors of such bankrupt.

Privilege  
of parlia-  
ment.

By sec. 9. If any such trader having privilege of parliament, shall commit any of the aforesaid acts of bankruptcy, a commission of bankrupt may issue against him, and the commissioners and all other persons acting under such commission, may proceed thereon in like manner as against other bankrupts, but such person shall not be subject to be arrested or imprisoned during the time of such privilege, except in cases hereby made felony.

Trader  
having  
privilege  
of parlia-  
ment, not  
satisfying  
creditors.

\*213

By sec. 10. If any creditor or creditors of any such trader, having privilege of parliament to such amount as is \*hereinafter declared requisite to support a commission, shall file an affidavit or affidavits in any court of Record at Westminster, that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall sue out of the same court a summons, or an original bill and summons against such trader, and serve him with a copy of such summons, if such trader shall not, within one calendar month after personal service of such summons, pay, secure, or compound for such debt or debts to the satisfaction of such creditor or creditors, or enter into a

bond in such sum, and with two sufficient sureties, as any of the judges of the court out of which such summons shall issue shall approve of, to pay such sum as shall be recovered in such action or actions, together with such costs as shall be given in the same, and within one calendar month next after personal service of such summons, cause an appearance or appearances to be entered to such action or actions, in the proper court or courts in which the same shall have been brought, every such trader shall be deemed to have committed an act of bankruptcy from the time of the service of such summons, and any creditor or creditors of such trader to such amount as aforesaid, may sue out a commission against him, and proceed thereon in like manner as against other bankrupts.

By sec. 11. If any decree or order shall have been pronounced in any cause depending in any court of equity, or any order made in any matter of bankruptcy or lunacy, against any such trader having privilege of parliament, ordering such trader to pay any sum of money, and such trader shall disobey, the same having been duly served upon him, the person or persons entitled to receive such sum under such decree or order, or interested in enforcing the payment thereof, pursuant to such decree or order, may apply to the court by which the same shall have been pronounced, to fix a peremptory day for the payment of such money, which shall accordingly be fixed by an order for that purpose; and if such trader, being personally served with such last-mentioned order eight days before the day therein appointed for payment of such money, shall neglect to pay the same, he shall be deemed to have committed an act of bankruptcy from the time of the service thereof, and any such creditor or creditors as aforesaid may sue out a commission against him, and proceed thereon in like manner as against other bankrupts.

Disobeying order of court for payment of money, to be an act of bankruptcy.

\*214

Before we notice the decisions applicable to the enactments above enumerated, it may be premised, that if an act of bankruptcy be committed at any time previous to the sealing of the commission, though after docket struck, or even on the day that the commission is dated, it will be sufficient.<sup>a</sup> The act of bankruptcy must be committed in England or Wales, unless otherwise provided for by the act, as by remaining out of the realm.<sup>b</sup>

A clear act of bankruptcy can never be purged; but if the act done be in itself equivocal, other circumstances may be called in to explain it.<sup>c</sup> Where a trader gave general orders to be denied, and he was denied accordingly to a creditor, but he immediately overtook the creditor and told him that he was

An act of bankruptcy once complete can never be purged.

<sup>a</sup> *Simpson v. Sikes*, 6 M. & S. 295. *Ex parte Dufrene*, 1 V. & B. 51. *Hopper v. Richmond*, 1 Stark. 507. (2 Eng. C. L. 488.)

<sup>b</sup> *Ex parte Smith*, cited in Cowp. 402. See *Inglis v. Grant*, 5 T. R. 530.

<sup>c</sup> Per Buller, J., citing the authority of Lord Mansfield, in *Colkett v. Freeman*, 2 T. R. 62. B. N. P. 39. See *ex parte Hall*, 1 Atk. 201.

Concerted  
act of  
bankrupt-  
cy.

not afraid of him, but another; held, that the act of bankruptcy was complete at the time of the denial, and that it was not purged by the subsequent conduct of the debtor.<sup>a</sup> It is no objection to the commission, or fiat, that the trader committed the act of bankruptcy at the suggestion of a friend, or for the very purpose of being made a bankrupt.<sup>b</sup> But an act of bankruptcy concerted between the trader and the petitioning creditor will not support a fiat, for persons who are privy to an act of bankruptcy cannot take advantage of it.<sup>c</sup> Yet a creditor not privy to such concerted act may avail himself of it.<sup>d</sup>

\*215     \*The act 1 & 2 W. IV, c. 56, s. 42, which enacts, "that 'no commission shall be superseded, nor any fiat annulled, nor any adjudication reversed, by reason only of its having been concerted by and between the petitioning creditor and the bankrupt,'" does not give validity to commissions of bankrupt founded on concerted acts of bankruptcy, and therefore the execution of a deed whereby a trader assigns all his property to a trustee for the benefit of all his creditors, is not an act of bankruptcy sufficient to support a commission founded on the petition of a creditor who was either party or privy to such a deed. "I take it to be clear," said Lord Denman, C. J., "that where the thing done as an act of bankruptcy is done by concert with a particular creditor, he cannot afterwards come into court and set up that as an act of bankruptcy. The fraud is not as to him, but as to the creditors jointly. The intent to delay them gives it the character of fraud."<sup>e</sup>

2. *If any trader shall depart this realm, or being out of the realm shall remain abroad, &c.*—The *realm*, in this case, means the extent of the jurisdiction of the courts of England. Where a trader, who had previously carried on business in partnership in London, after the dissolution of the partnership established a house of trade in Dublin, and having come over to London to make arrangements with his creditors, he was informed that a creditor intended to arrest him the following day, upon which he immediately returned to Dublin; the court held, that he had committed an act of bankruptcy by departing the realm with an intent to delay a creditor.<sup>f</sup> Departing the realm in order to constitute an act of bankruptcy, must be

<sup>a</sup> Mucklow v. May, 1 Taunt. 479. *Ex parte* Gardner, 1 V. & B. 45.

<sup>b</sup> Simpson v. Sikes, 6 M. & S. 295. Roberts v. Teesdale, Peake, 27.

<sup>c</sup> *Per Curiam*, in Banford v. Baron, 2 T. R. 594, n. *Per* Lord Mansfield, in Hooper v. Smith, 1 Bl. 441, cited *id.* *Ex parte* Gouthwaite, 1 Rose, 87; but it is good as against such parties, B. N. P. 40.

<sup>d</sup> *Ex parte* Bourne, 16 Ves. 145.

<sup>e</sup> Marshall v. Backworth, 4 B. & Ad. 508. (24 Eng. C. L. 108.) The statute 6 Geo. IV, c. 16, s. 7, as to concerted declarations of insolvency, raises a strong inference that all other concerted acts of bankruptcy were at that time considered as rendering a commission invalid. *Per* Lord Denman, *id.*

<sup>f</sup> Williams v. Nunn, 1 Taunt. 270.



with an *intent* to delay a creditor, which is a question for the jury; for if there be no such intention, even though creditors be delayed, it is not an act of bankruptcy, for a trader has a right to go abroad to look *\*after* his concerns, though his creditors be thereby delayed; but if an apprehension of arrest be coupled with a justifiable motive, it is otherwise.<sup>a</sup>

\*216

But if the necessary consequence of a trader's departing the realm, is, that his creditors must be delayed, it amounts to an act of bankruptcy;<sup>b</sup> for a man may be supposed to foresee and intend, whatever is the necessary consequence of his own acts.<sup>b</sup> Therefore, where the creditors of a trader who went abroad on account of having killed his wife, were delayed thereby, it was adjudged an act of bankruptcy.<sup>c</sup> But it has been decided that though creditors were delayed in consequence of a departure, that circumstance was not sufficient to constitute an act of bankruptcy without evidence of an intention to delay them at the instant of departure, and that the presence of creditors, though strong, was not conclusive evidence of such an intention.<sup>d</sup>

If delay be the necessary consequence of departing, it is an act of bankruptcy.

Where a trader appointed to meet a creditor to make arrangements respecting their accounts, but instead of doing so went to France, and left a letter behind him directed to the creditor, saying he would be back in ten days, and in the mean time, would make proposals to his creditors; he wrote another letter to him from Calais; in a month afterwards he wrote a third letter, saying that he was under the necessity of remaining in France; held, that the departing the realm, and absence abroad, being a continuous act, and those letters having been written during its continuance, they were admissible in evidence to establish an act of bankruptcy, by showing the intent with which the trader departed.<sup>e</sup>

When a trader departs the realm from a proper motive, but upon discovery of his embarrassments remains abroad, with intent to delay his creditors, it is an act of bankruptcy. But the *\*remaining* abroad must be with intent to defeat or delay his creditors in the recovery of their debts. A trader being in debt to several persons, left this country in June, 1831, for America, with an intention to return; but without making any provision for the payment of his debts. Not having returned in 1833, a *fiat* was sued out against him, which by his agent in this country he endeavored to supersede; held, that his continued absence during that period amounted to an act

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<sup>a</sup> Warner v. Barber, Holt, 175. (3 Eng. C. L. 66.) Windham v. Patterson, 1 Stark. 144. (2 Eng. C. L. 331.) 2 Rose, 466. *Ex parte* Mutrie, 5 Ves. 574, 8. P.

<sup>b</sup> Ramsbottom v. Lewis, 1 Campb. 279.

<sup>c</sup> Woodier's Case, B. N. P. 39. In Raikes v. Poreau, Cooke, 73; and Vernon v. Hankey, *id.* 98. Buller, J., recognised this case. See Sel. N. P. 185.

<sup>d</sup> *Ex parte* Osborne, 2 V. & B. 177. 1 Rose, 387.

<sup>e</sup> Rawson v. Haigh, 2 Bing. 99. (9 Eng. C. L. 335.) 8. C. 1 C. & P. 77.



of bankruptcy, and that the *fiat* could not be superseded without the previous surrender of the bankrupt.<sup>a</sup>

Departing with intent to delay creditors, is an act of bankruptcy though none be delayed.

\*218

What is evidence of intent.

3.—*Or depart from his dwelling-house.*] The departure must be with an intent to delay a creditor, and if it appears that such was the *intent and purpose* of the trader's departure it is immaterial whether any creditor was thereby delayed or not.<sup>b</sup> But if he had no such *intention* in departing, it does not constitute an act of bankruptcy, even though his creditors were thereby delayed.<sup>c</sup> A departure to avoid an arrest is an act of bankruptcy;<sup>d</sup> though under the impression of a groundless apprehension.<sup>e</sup> Where a trader, being called upon by appointment left the room, and his wife told the creditor he was gone out, it was held to be an act of bankruptcy.<sup>f</sup> The length of absence is immaterial, as the act of bankruptcy is complete the moment he departs.<sup>g</sup> A departing from the trader's place of business, though he has a dwelling-house elsewhere, is an act of bankruptcy.<sup>h</sup> A trader who has no fixed dwelling-house or counting-house, but takes up a temporary residence at a public-house in the place where his business carries him, commits an act of bankruptcy by departing from such public house with intent to delay his creditors.<sup>i</sup>

To prove the *intent*, it has been held, that a declaration by a bankrupt, of his motives for absenting himself from home, made at the time, is admissible in evidence; but in strictness the declaration ought to accompany the act, or be so connected with it, that it may properly be considered as the result and consequence of the co-existing motives.<sup>j</sup> So, an admission by a trader during his absence from his dwelling-house, or in preparing to depart, or in the act of returning, that he has absented himself to avoid his creditors, is good evidence.<sup>k</sup> The declaration of a bankrupt on his return, that he had absented himself to avoid a writ against him, has been considered sufficient evidence of an act of bankruptcy, without any other proof of the existence of the writ, or of the debt of the creditor.<sup>l</sup> But such declarations, to be properly admissible in evidence, should be proved to have been made during his absence, or so soon

<sup>a</sup> *Ex parte* Kirkman, 3 Dea. & Ch. 451.

<sup>b</sup> Robertson v. Liddell, 9 East, 487. Hammond v. Hineks, 5 Esp. 139. Holroyd v. Whitehead, 3 Campb. 530.

<sup>c</sup> Fowler v. Padget, 7. T. R. 509. Alridge v. Ireland, 1 Taunt. 273, n.

<sup>d</sup> Warner v. Barber, Holt, 175. (3 Eng. C. L. 66.)

<sup>e</sup> *Ex parte* Bamford, 15 Ves. 447. Newman v. Stretch, M. & M. 338. (22 Eng. C. L. 330.)

<sup>f</sup> Cherrington v. Browne, 11 Moore, 341. (22 Eng. C. L. 410.)

<sup>g</sup> Holroyd v. Gwynne, 2 Taunt. 176.

<sup>h</sup> Judine v. Da Cossem, 1 N. R. 234. Spencer v. Billing, 3 Campb. 312.

<sup>i</sup> Holroyd v. Gwynne, *ante*, 217.

<sup>j</sup> Bateman v. Bailey, 5 T. R. 512. *Ex parte* Hayne, 1 Rose, 150. Ambrose v. Clendon, Rep. T. Hard. 267. 2 Phil. Ev. 339.

<sup>k</sup> Marsh v. Meager, 1 Stark. 353. (2 Eng. C. L. 423.) 2 Phil. Ev. 339.

<sup>l</sup> Newman v. Stretch, M. & M. 338. (22 Eng. C. L. 330.)

after his return as that they might be considered as constituting part of one and the same transaction. A declaration made *shortly* after the return of the bankrupt, has been held to be inadmissible.<sup>a</sup> Where a trader was embarrassed in his circumstances in December, 1834, and in January, 1835, and on the 25th of February, an execution being in his house, he left home and did not return for three weeks; on a question whether he had committed an act of bankruptcy on the 5th of March; held, that two letters written by him on the 16th of January, were admissible in evidence to show the motives of his absence from home; Tindal, C. J., observed, that they clearly came within that class of evidence, which is allowed to show the effect of an equivocal act.<sup>b</sup>

4.—*Or otherwise absent himself.*] A trader's absenting himself \*from any place with intent to delay a creditor, is an act of bankruptcy, whether the creditor be delayed or not.<sup>c</sup> As where a newsman who was in the habit of attending the Royal Exchange, left it on seeing one of his creditors whom he had appointed to meet there, desiring a friend to say he was not there.<sup>d</sup> So where a trader absented himself from his counting-house, and desired his clerk to say that he had been there, when in fact he was absent. Held, in both cases, to be an act of bankruptcy.<sup>e</sup> But according to the decisions, "*absenting himself*," has hitherto been confined to the case of a party absenting himself from the place of his abode, or a place in which he had any business to transact, or from one or more particular creditors at some other place.<sup>f</sup> Where a creditor called upon a trader, who pretended to go out to get money to pay him, but did not return or endeavor to procure money; held, an act of bankruptcy.<sup>g</sup>

Absenting from home or place of business with intent, &c., an act of bankruptcy.  
\*219

Where a trader upon being arrested for debt escaped from the officer, and fled into the house of another, where he was pursued by the officer to whom he was there denied, the door being kept fast; and while there he stated that he did it through fear of other creditors; and when it was dark he returned home to his own house and gave directions to deny him to any one that called, and from that time he continued for nearly a month in his bedchamber; held, that this constituted one or more acts of bankruptcy, under the words "*absenting himself*," and "*beginning to keep house*."<sup>h</sup>

Escape from an officer, and denial to a creditor.

<sup>a</sup> Lees v. Marten, 1 Mood. & Rob. 210. Johnston v. Woolf, 2 Scott, 372. (30 C. L. 451.)

<sup>b</sup> Smith v. Cramer, 1 Bing. N. C. 585. (27 Eng. C. L. 498.) 1 Hodges, 124, S. C.

<sup>c</sup> Hallen v. Homer, 1 C. & P. 108. (11 Eng. C. L. 333.) Curteis v. Willes. id. 211. (11 Eng. C. L. 372.) 6 D. & R. 224.

<sup>d</sup> Gillingham v. Laing, 6 Taunt. 532. (1 Eng. C. L. 476.)

<sup>e</sup> Shannon v. Owen, 1 Man. & Ry. 392, n. (17 Eng. C. L. 260.)

<sup>f</sup> Per Lord Tenterden, in Bernasconi v. Farebrother, 10 B. & C. 556-8. (21 Eng. C. L. 128.)

<sup>g</sup> Bigg v. Spooner, 2 Esp. 651.

<sup>h</sup> Bayly v. Schofield, 1 M. & S. 338.

Absenting  
in apprehension of  
arrest.

So, where a trader went into a neighbor's shop, and said that he expected to be arrested, and when he was about to leave, he was informed that a sheriff's officer was going towards his house, upon which he became agitated and desired his neighbor to watch him, while he himself went into the back shop, to avoid being seen by the officer. When he was \*220 \*told that the officer had left the street, he said, "Thank God, I will now go," and immediately returned home; held, an act of bankruptcy.<sup>a</sup> If a trader, in apprehension of being arrested abstains from going to a particular place to inquire if there be an execution against him, he absents himself with intent to delay his creditors.<sup>b</sup> Where one of three partners in a bank in Bath, came to London to raise funds, and having failed to do so, he remained there three days; held, an act of bankruptcy.<sup>c</sup>

Not keep-  
ing an ap-  
pointment.

If a trader makes an appointment with a creditor to meet him at a particular place, and fails to keep such appointment; it is an act of bankruptcy or not, according to the *intention* of the trader, which is a question for the jury.<sup>d</sup> Where a trader on being arrested was liberated on his undertaking to execute a bail bond; held, that his omission to attend to execute the bond, did not amount to an act of bankruptcy.<sup>e</sup> Where a trader was informed by the attorney of the petitioning creditor that the sheriff's officer had a warrant to arrest him, and advised by the same attorney to repair to his office to avoid being arrested in the street, which the trader did, and remained there a considerable time; held, not an act of bankruptcy.<sup>f</sup>

A trader left at his house a message for a creditor, who had in his absence called for a debt, that he could spare no money, and would not pay him that day, and would go out of the way and not return home till dinner time; held, that it was a question for the jury to say, whether he absented himself with an intent to delay the creditor; and this evidence warranted the conclusion that he did not.<sup>g</sup>

\*221  
Keeping  
house

5.—*Or begin to keep house.*] Generally, if a trader secludes himself in his house to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, *he begins to keep house* within the meaning of the legislature, and commits an act of bankruptcy.<sup>h</sup> The time during which the trader has kept house is immaterial, provided it was done with an intent to delay his creditors, and it is also

<sup>a</sup> *Chenoweth v. Hay*, 1 M. & S. 676.

<sup>b</sup> *Robson v. Rolls*, 9 Bing. 648. (23 Eng. C. L. 409.)

<sup>c</sup> *Cumming v. Bailey*, 6 Bing. 363. (19 Eng. C. L. 104.)

<sup>d</sup> *Lees v. Marton*, 1 M. & Rob. 210. *Tucker v. Jones*, 2 Bing. 2. (9 Eng. C. L. 291.) *Robinson v. Carrington*, 1 Mont. & Ayr. 12. *Ex parte Lavender*, 2 Mont. & Ayr. 11.

<sup>e</sup> *Schooling v. Lee*, 3 Stark. 149. (14 Eng. C. L. 173.)

<sup>f</sup> *Mills v. Elton*, 3 Price, 142.

<sup>g</sup> *Vincent v. Prater*, 4 Taunt. 603. 2 Rose, 275.

<sup>h</sup> Per Lord Ellenborough, C. J., in *Dudley v. Vaughan*, 1 Campb. 279.

immaterial whether any creditor was delayed or not.<sup>a</sup> A trader having been arrested on the 20th of May, desired his servants not to let into the house any persons whom they did not know, as he was afraid of being arrested again. On the morning of the 21st the doors of the house were kept shut, and no person was admitted until it had been ascertained from the window who he was; held, that an act of bankruptcy was committed in the morning of the 20th, though no creditor was actually denied. "It is impossible to doubt," said Abbott, C. J., "that a trader who intends to delay his creditors, either by keeping house or otherwise absenting himself, is guilty of an act of bankruptcy, although no creditor be thereby actually delayed."<sup>b</sup> If a trader order that he shall be denied to a particular creditor, or to all creditors generally, or to every person who may call, it is evidence sufficient to raise a presumption of his *beginning to keep house*, and the usual evidence given of it.<sup>c</sup>

Where a trader was in the rules of the King's bench, and had come to his own house out of the rules, and was there denied to a clerk of the creditor, it was held, to be an act of bankruptcy.<sup>d</sup> So, also, was a denial to a creditor calling for his debt at the bankrupt's lodging, not his usual place of business; for a creditor has a right to call on his debtor where he pleases.<sup>e</sup> So was a denial to a collector of taxes;<sup>f</sup> and to a person who called in consequence of the dishonor of a bill; for it is the intention of the trader in being denied, and not the object of the person calling, which may be considered to constitute "a keeping house."<sup>g</sup> A denial without any previous order to do so is not an act of bankruptcy, although the trader subsequently approves of it.<sup>h</sup> But if a trader hears himself denied to a creditor by one of his family, and does not come forward, it is an act of bankruptcy, if done with an intent to delay creditors, though he had not previously given directions to deny him.<sup>i</sup> Where a trader, being in apprehension of arrest, gave directions to his servants to deny him in case a sheriff's officer called; held, that, the sheriff's officer not having called,

When denial to a creditor is an act of bankruptcy.

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<sup>a</sup> Heylor v. Hall, Palmer, 325. Sel. N. P. 180.

<sup>b</sup> Harvey v. Ramsbottom, 1 B. & C. 55. (8 Eng. C. L. 25.) Lloyd v. Heathcote, 5 Moore, 129. (6 Eng. C. L. 166.) See Fisher v. Boucher, 10 B. & C. 705, (21 Eng. C. L. 152,) *post.* 222.

<sup>c</sup> Mucklow v. May, 1 Taunt. 479. Bayley v. Schofield, 1 M. & S. 338. Lazarus v. Waithman, 5 Moore, 313. (16 Eng. C. L. 401.) See several other cases cited in Arch. B. L. 6 ed. 49.

<sup>d</sup> Hughes v. Gilman, 2 C. & P. 32. (12 Eng. C. L. 14.) 10 Moore, 480. (17 Eng. C. L. 152.)

<sup>e</sup> Park v. Prosser, 1 C. & P. 176. (11 Eng. C. L. 358.)

<sup>f</sup> Sanderson v. Laferest, *id.* 46, (11 Eng. C. L. 309,) 336. So to the collectors of church and highway rates. Lloyd v. Heathcote, 5 Moore, 129. (6 Eng. C. L. 166.)

<sup>g</sup> Bleasby v. Crossley, 2 C. & P. 213. (12 Eng. C. L. 95.)

<sup>h</sup> *Ex parte* Foster, 1 Rose, 50. 17 Yes. 416. See Deffle v. Desanges, 8 Taunt. 671. (4 Eng. C. L. 244.)

<sup>i</sup> Smith v. Moon, M. & M. 458. (22 Eng. C. L. 356.)

this of itself was not sufficient evidence of a beginning to keep house. Lord Tenterden, C. J.: "If he had followed up that direction by retiring to a part of the house which he did not usually occupy, that would have been evidence of a beginning to keep house with intent to delay creditors, although there was no actual denial to a creditor." There is no authority to show that a mere direction given by a trader to his servant to deny him to his creditors generally, or to any particular creditor by name, not followed up by any actual denial, or by any other act which is evidence of an actual beginning to keep house, is an act of bankruptcy.<sup>a</sup>

A trader having been denied to a creditor who called for money, was after a little time seen peeping over his wife's shoulder. Upon another occasion seeing a creditor coming, he retired behind a partition at the back of the shop, and his wife coming forward, said he was not at home; held, that the jury were properly directed to consider whether the trader had kept his house, and had wilfully secluded himself to avoid meeting the creditor.<sup>b</sup> A denial on a Sunday has been held, not to be evidence of a beginning to keep house, though the trader had made an appointment with the creditor on that day for the purpose of settling accounts.<sup>c</sup>

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A denial  
is only  
evidence  
of an in-  
tention to  
delay cre-  
ditors.

But a denial is no more than evidence of intention to delay creditors, and the presumption of such being the motive may be repelled; as was observed by Lord Ellenborough,<sup>d</sup> "a simple denial to a creditor is not enough to make a trader a bankrupt. He may not only order himself to be denied at unreasonable hours in the night; but in the course of the day when he is taking his meals, and on other occasions which may easily be imagined; he may refuse to see his creditors without meaning to delay them, and therefore without committing an act of bankruptcy, though they should be for a time delayed."

If a trader is denied when at home, to a creditor who merely demands payment of money, but does not ask to see him personally, this is not evidence of a beginning to keep house.<sup>e</sup>

If a trader see his debtor, is the most usual and familiar evidence of a secludes himself, so as to prevent the access of his cre-  
But though an authorised denial to a creditor requiring to *beginning to keep house*, within the meaning of the statute; it is not the only evidence by which this may be proved. If a trader has no servant, the act cannot be evinced through such medium. In that case, if he shuts himself up in his house, debarring all access to it, whereby his creditors are delayed,

<sup>a</sup> Fisher v. Boucher, 10 B. & C. 705. (21 Eng. C. L. 152.)

<sup>b</sup> Key v. Shaw, 8 Bing. 320. (21 Eng. C. L. 305.)

<sup>c</sup> Ex parte Preston, 2 V. & B. 312. Ex parte Hall, 1 Atk. 207. Stafford v. Clarke, 1 C. & P. 27.

<sup>d</sup> In Smith v. Currie, 3 Campb. 271. The denial to a creditor is usually given in evidence, not to show the fact of the creditor's being delayed, but as evidence to explain the equivocal act of the trader's keeping in his house, and to show that he began to keep house with intent to delay his creditors. Robertson v. Liddell, 9 East, 487.

<sup>e</sup> Dudley v. Vaughan, 1 Campb. 271.

an act of bankruptcy is established by proof of his having done so.<sup>a</sup> If a trader secretes himself in the house of a friend where he lodges, and where persons are in the habit of calling upon him, it is an act of bankruptcy.<sup>b</sup> Where partners in a banking house closed the windows and shutters of the bank and they themselves remained within, but their customers could not gain admission; held, an act of bankruptcy though the partners did not reside therein.<sup>c</sup> But if a partner who resides at the place of business, commits an act of bankruptcy, it is no evidence of an act of bankruptcy by the partners who reside elsewhere.<sup>d</sup> If a man, not having a house of his own, keep \*within the house of another, or in chambers, or on board a ship, or if a miller keep within his mill or the like, this is an act of bankruptcy.<sup>e</sup> Where a trader directed his servant that if any person called while he was at dinner or engaged in business, to deny him, and a creditor called and was denied; held, that such instructions did not amount to a general denial, and therefore did not constitute an act of bankruptcy.<sup>f</sup>

ditors, it is an act of bankruptcy.

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6.—*Any fraudulent conveyance.*] An assignment or conveyance of *all* a trader's effects to a particular creditor;<sup>g</sup> or in *trust* for the benefit of a particular creditor;<sup>h</sup> or of all his creditors;<sup>i</sup> or of some creditors in exclusion of others;<sup>j</sup> or as an indemnity to a surety; or to a person who is about to advance money;<sup>k</sup> however fair such transaction may be, as between the parties themselves, is an act of bankruptcy, for it is a fraud on the rest of the creditors.

An assignment of all a trader's effects is an act of bankruptcy.

There is a great difference between the conveyance of *all* and of *part*. A conveyance of part may be public, fair, and honest; as a trader may *sell* so he may *openly transfer* many kinds of property, by way of *security*; but a conveyance of *all* must either be fraudulently kept secret, or produce an immediate absolute bankruptcy;<sup>l</sup> and a *colorable exception* of a *small part* of his estate or effects would not help the matter: for the court would never suffer that an evasion should prevail to take such a case out of the general rule, which is so essentially necessary to be observed in order to a due execution of this system of laws.<sup>m</sup>

<sup>a</sup> Per Lord Ellenborough, C. J., *id.*

<sup>b</sup> *Curteis v. Willis*, 1 R. & M. 58. (11 Eng. C. L. 372.) 4 D. & R. 224. (16 Eng. C. L. 196.)

<sup>c</sup> *Cumming v. Bailey*, 6 Bing. 363; (19 Eng. C. L. 104;) but see *ex parte Mavor*, 19 Ves. 543.

<sup>d</sup> *Mills v. Bennett*, 2 M. & S. 556. 2 Rose, 269.

<sup>e</sup> *Stone*, 9, 123. Arch. 48.

<sup>f</sup> *Shew v. Thompson*, Holt, 159. (3 Eng. C. L. 61.)

<sup>g</sup> *Worseley v. De Mattos*, 1 Burr. 467. The reason why a man becomes a bankrupt who conveys away all his property, is that he thereby becomes incapable of trading. Per Lord Mansfield, in *Hassels v. Simpson*, *infra*.

<sup>h</sup> *Wilson v. Day*, 2 Burr. 827.

<sup>i</sup> *Stewart v. Moody*, 1 C. M. & R. 777.

<sup>j</sup> *Compton v. Bedford*, 1 W. Bl. 262.

<sup>k</sup> *Hassels v. Simpson*, Doug. 88, *n.*

<sup>l</sup> Per Lord Mansfield, C. J., in *Worseley v. De Mattos*, *supra*.

<sup>m</sup> Per Lord Mansfield, in *Wilson v. Day*, 2 Burr. 832. Where a trader made an



\*As a general proposition, it cannot be disputed, that a conveyance by deed by a trader of all his property to a particular creditor, in prejudice to the rest, is an act of bankruptcy.<sup>a</sup> The principle of all the cases is, that if the conveyance to a particular creditor necessarily prevent the property from being distributed as the law requires in cases of bankruptcy, that is in itself an act of bankruptcy.<sup>b</sup>

Bill of  
sale to a  
creditor.

Convey-  
ance to  
trustees  
for the be-  
nefit of  
creditors.

Where a trader knowing that he was insolvent, being arrested at the suit of a particular creditor for a just debt, gave a bill of sale of all his effects to the creditor in trust to satisfy his debt, and pay over the surplus, if any, to the trader, there being another writ out against the trader at the time, but of which the particular creditor was ignorant; held, an act of bankruptcy; for as such an act must have the effect of defeating or delaying all his creditors, by stripping him of all he had and disabling him from carrying on his trade, the inference from it was that he meant to defraud all his other creditors.<sup>c</sup> Where a trader conveyed all his property by deed to trustees for the benefit of his creditors, all of whom, except one, were parties thereto, the deed contained a proviso, that it should be void if the trustees should think fit to avoid it; held, an act of bankruptcy, and that it was no objection to an action by the assignees that the creditors who were parties to the above deed were assignees, as such an estoppel applied only to the petitioning creditor, who in this case was the party who had refused his concurrence in the arrangement. For the validity of the commission depended on the right of the creditor to petition, and not upon who should be chosen assignees.<sup>d</sup>

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So where bankers being in failing circumstances, and who \*had stopped payment, made an assignment of all their estate and effects to trustees for the benefit of their creditors, merely for the *purpose of being made bankrupts*, it was held to be an act of bankruptcy.<sup>e</sup> For the ground upon which a deed assigning all the trader's property is an act of bankruptcy is this, that it takes away from him all further power of carrying on his trade, and subjects all his property to distribution without safeguards and assistances which the bankrupt laws pro-

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assignment of the bulk of his property (except his household goods) to trustees for the benefit of the creditors mentioned in a schedule, from which the name of one creditor was purposely excluded, it was held an act of bankruptcy. *Ex parte Foord*, cited 1 Burr. 477; and so where a trader mortgaged all his stock in trade except his household goods, which were very inconsiderable. *Law v. Skinner*, 2 Bl. 996. *Compton v. Bedford*, *supra*, S. P.

<sup>a</sup> Per Lord Ellenborough, C. J., in *Newton v. Chantler*, 7 East, 143.

<sup>b</sup> Per Le Blanc, J., *id.* 145.

<sup>c</sup> *Newton v. Chantler*, 7 East, 138.

<sup>d</sup> *Tappenden v. Burgess*, 4 East, 230. It appears from this that an assignment cannot operate as an act of bankruptcy if all the creditors assent to the deed, for any creditor who is a party to the assignment cannot petition. See *Bamford v. Barron*, 2 T. R. 594. *Back v. Gooch*, 4 Campb. 232; and other cases in Arch. B. L. 52; and so it was expressly decided in *Marshall v. Barkworth*, 4 B. & Ad. 508. (24 Eng. C. L. 108.) See *post*, 237, *n. k.*

<sup>e</sup> *Simpson v. Sikes*, 6 M. & S. 295. *Dutton v. Morrison*, 17 Ves. 199, S. P.

vide; and this ground applies with equal force, whatever may be the trader's motive for executing the deed.<sup>a</sup> And it has been held, that the execution of a deed by which a trader conveyed the whole of his property to the use of some of his creditors, was an act of bankruptcy, though it was executed by the trader only, and not by any of his creditors, and though there was no evidence of it having been acted upon, or of it having passed out of the trader's hands.<sup>b</sup> "I take it to be perfectly well settled, that where a trader makes an assignment of all his effects, or of all except a very small portion, it is necessarily an act of bankruptcy without any actual fraud."<sup>c</sup> "I always understood that a conveyance of *all* a trader's effects was an act of bankruptcy of itself, and that a conveyance of any part of them was an act of bankruptcy if it were fraudulently made."<sup>d</sup>

But though an assignment of *all* a trader's effects for the benefit of his creditors constitutes an act of bankruptcy, yet such an assignment for a valuable consideration and without fraud has not the same effect; all the cases where the assignment of his property by a trader has been deemed fraudulent and an act of bankruptcy, have been where it has been given for a by-gone and before contracted debt; but it never can be taken to be law \*that a trader cannot sell his property when his affairs become embarrassed, or assign them to a person who would assist him in his difficulties, as a security for any advances which such person might make to him.<sup>e</sup>

Assignment of all effects for a valuable consideration and without fraud, is not an act of bankruptcy.  
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The sale of a tradesman's stock to a *bona fide* purchaser, who pays the fair price of it, in ignorance of any fraudulent intention of the seller, is not an act of bankruptcy, though the object of the trader may be to defraud his creditors.

Where a trader, by deed, assigned to the defendant the lease of his premises and all his effects at a valuation; and having obtained the purchase-money he absconded; the jury found that the trader had made the assignment with intent to defraud his creditors, but that the defendant was no party to the fraud; held, not to constitute an act of bankruptcy. Lord Denman, C. J., in delivering the judgment of the court said, "If the language of the clause is construed with strictness, it is not the transfer and delivery of the goods, that can be called fraudulent in any sense. The trader is bound to deliver the goods he has sold for valuable consideration, receiving in return for them a

The sale of the whole of a trader's effects is not an act of bankruptcy, unless, to the knowledge of both the contract-

<sup>a</sup> Per Lord Ellenborough, C. J., 6 M. & S. 312. *Stewart v. Moody*, 1 C. M. & R. 777.

<sup>b</sup> *Botcherby v. Lancaster*, 1 Ad. & Ell. 77. (28 Eng. C. L. 45.) In *Pulling v. Tucker*, 4 B. & Al. 382, (6 Eng. C. L. 455,) the deed of conveyance did not pass out of the bankrupt's hands, nor was it acted upon. It was found among his papers by the messenger to the commission.

<sup>c</sup> Per Parke, B., in *Siebert v. Spooner*, 1 M. & W. 718.

<sup>d</sup> Per Alderson, B., *id.* *Scott v. Thomas*, 6 C. & P. 611; (25 Eng. C. L. 262;) and a delivery of goods to one to whom no debt is due is a fraudulent delivery, *id.*

<sup>e</sup> Per Lord Kenyon, C. J., in *Whitwell v. Thompson*, 1 Esp. 72.

ing parties, it be intended as a fraud on the creditors.

fund of equal value, which might be made available for the benefit of his creditors. It is remarkable that the word sale does not occur in the clause, and equally so that none of the old cases turns on a sale accompanied with payment of the full price. Again, the court held, in *Hill v. Farnell*,<sup>a</sup> that where part of the property had been sold by a trader after an act of bankruptcy, but *bond fide* bought, the purchaser could not be compelled to part with the goods, unless the assignees at least tendered the price. The incongruity would indeed be monstrous if the purchaser were to be at liberty to keep goods so obtained, but should be disabled from recovering a dividend on the price he had *bond fide* paid, if no previous act of bankruptcy had been committed. If the transfer and delivery of any part of the property may be by the statute an act of bankruptcy, a trader carrying on business in the ordinary way may be made a bankrupt by a regular sale in his shop, by proof subsequently obtained that he had a scheme for cheating his creditors of the money, and in that case the unfortunate purchaser must both \*yield up to the assignees the articles bought, and lose his right of proving under the commission. These startling consequences, which would perhaps warrant some degree of violence to the wording of the law, will be avoided by confining the epithet fraudulent, to the gift, transfer or delivery of goods, and not extending it to the projects which possibly the trader may entertain as to the disposal of the purchase-money; whatever authority exists on this subject coincides with this view.”<sup>b</sup> If the sale be in fact fraudulent, and the buyer as a man of business ought to suspect and believe that the seller was defrauding his creditors, even though it be of part of the property only, it is an act of bankruptcy.<sup>c</sup>

An assignment of part of a trader's effects is not an act of bankruptcy, unless it be voluntary and in contemplation of bankruptcy.

An assignment of a *part* of a trader's effects to a particular creditor does not constitute an act of bankruptcy, unless it be voluntary and in contemplation of bankruptcy;<sup>d</sup> or unless he conveys away so much of his property as to incapacitate himself from carrying on his business from the insolvency that would ensue.<sup>e</sup>

The mere circumstance, of the trader being in insolvent circumstances, or contemplating insolvency, at the time of the assignment, is not conclusive evidence that he contemplated bankruptcy, if there be no fraud nor design to put the property in a train of distribution different from that of the bankrupt law.

<sup>a</sup> 9 B. & C. 45. (17 Eng. C. L. 330.)

<sup>b</sup> *Baxter v. Pritchard*, 1 Ad. & Ell. 456. (28 Eng. C. L. 124.) See also *Rose v. Haycock*, *id. n.*; where Lord Tenterden said, that a fair and *bond fide* sale was scarcely within the mischief for which the bankrupt act proposed a remedy. *Hunt v. Mortimer*, 10 B. & C. 44. (21 Eng. C. L. 26.)

<sup>c</sup> *Cooke v. Caldecot*, M. & M. 522. (21 Eng. C. L. 403.)

<sup>d</sup> *Morgan v. Brundrett*, 5 B. & Ad. 296. (27 Eng. C. L. 79.) See *Robinson v. Carrington*, 1 Mont. & Ayr. 1. *Belcher v. Prittie*, 10 Bing. 408. (25 Eng. C. L. 184.) *Greenwood v. Churchill*, 1 Myl. & K. 546. *Carr v. Burdiss*, 1 C. M. & R. 443.

<sup>e</sup> *Wedge v. Newlyn*, 4 B. & Ad. 831, (24 Eng. C. L. 173,) *post*, 232.

The following dicta and decisions of learned judges will illustrate these positions. "The delivery in the expectation of *insolvency* only, would not be an illegal act, because it is only from the bankrupt laws, the policy of which is that all the creditors should be paid alike, that the illegality arises. It must be an act then not only that in effect contravenes the bankrupt laws, but it must be done with intent to contravene them, and in contemplation of bankruptcy."<sup>a</sup> "The \*recent cases<sup>b</sup> have gone too great a length, they seem to have proceeded on the principle, that if a party be insolvent at the time that he makes a payment or a delivery, and afterwards becomes a bankrupt, he must be deemed to have contemplated bankruptcy at the time when he made such payment; but I think that is not correct, for a man may be insolvent, and yet not contemplate bankruptcy."<sup>c</sup> \*229

Where a trader in embarrassed circumstances, gave a bill of sale of part of his property to a particular creditor, the court held, that it was properly left to the jury to say, whether it was a voluntary deed and given in contemplation of bankruptcy.<sup>d</sup> And in a recent case, where the learned judge gave a similar direction to the jury, the Court of Common Pleas held, that it was correct. Tindal, C. J., observed, "that up to the time of the act of bankruptcy, the bankrupt may do what he pleases with his property; it is an exception when in contemplation of bankruptcy he disposes of his property, because a fraud is then practised on his creditors. The cases on this subject have gone too far. The proper question for the jury was, whether the payments were made in contemplation of bankruptcy."<sup>e</sup> Where a tradesman being in insolvent circumstances voluntarily conveyed by deed his equity of redemption in certain premises, to particular creditors as a security for sums of money therein stated to have been advanced by them and it appeared that no money was paid at the time when the deed was executed, and that one of the creditors named in the deed had not heard of it \*until after the bankruptcy, and that \*230

<sup>a</sup> Per Gibbs, C. J., in *Fidgeon v. Sharpe*, 1 Marsh, 198. (1 Eng. C. L. 183.)

<sup>b</sup> Alluding to *Flook v. Jones*, 4 Bing. 20. (13 Eng. C. L. 328.) *Poland v. Glynn*, *id.*, 22. *Morgan v. Horseman*, 3 Taunt. 341. *Pulling v. Tucker*, 4 B. & A. 382. (6 Eng. C. L. 455.)

<sup>c</sup> Per Patteson, J., *Morgan v. Brundrett*, 5 B. & Ad. 297; (27 Eng. C. L. 79;) recognised by Tindal, C. J., in *Atkinson v. Brindle*, 1 Hodges, 337. A transfer of goods in satisfaction of a *bona fide* debt, made voluntarily and in contemplation of bankruptcy, is an act of bankruptcy, and not protected by the 81st sec., though made more than two months before a commission issues. *Bevan v. Nunn*, 9 Bing. 107. (23 Eng. C. L. 272.)

<sup>d</sup> *Gibbins v. Phillips*, 7 B. & C. 529. (14 Eng. C. L. 97.)

<sup>e</sup> *Atkinson v. Brindle*, 1 Hodges, 336. 2 Bing. N. C. 227; (29 Eng. C. L. 316;) and see *Doe v. Gillett*, 2 C. M. & R. 580. Where a creditor obtained a preference not fraudulent, and with a view to an intended composition with creditors, but without any view to a bankruptcy, and the composition never took place, but the trader afterwards became bankrupt; held, that the creditor was entitled to receive his securities. *Wheelwright v. Jackson*, 5 Taunt. 109. (1 Eng. C. L. 30.)

the bankrupt had kept the deed in his own possession, and had continued to carry on business for three years afterwards; held, that it was properly left to the jury to say, whether it was not a fraudulent conveyance voluntarily made by the bankrupt, with a view to give a preference to particular creditors, and if so, that it was an act of bankruptcy.<sup>a</sup>

When the transfer of a part of a trader's effects will not constitute an act of bankruptcy.

The principle upon which an assignment of *all* a trader's effects to his creditors constitutes an act of bankruptcy being, that it disables him from carrying on his trade, and that it prevents a distribution of his property, according to the law of bankruptcy, as an assignment of a part of a trader's effects is not necessarily attended with the same consequences, a trader may transfer a portion of his effects to a creditor either for past debts or future advances, and if done *bond fide* without fraud, it will not be deemed an act of bankruptcy, provided he has not parted with so much of his stock in trade as will impede his continuing the business.

A soap manufacturer being indebted to his bankers, assigned to them his leasehold premises, with all his stock in trade and utensils, and also a policy of insurance, as a security for money advanced, or to be advanced, with a power of sale; and a power that he should retain possession himself until default; but the assignment did not include all his property: held, that the deed being made *bond fide* was not an act of bankruptcy.<sup>b</sup> So where a trader, after having committed acts of bankruptcy, being embarrassed in his circumstances, conveyed his freehold and leasehold estates to trustees, upon trust to sell or mortgage, and to apply the produce as he should direct; and it appeared that the purpose of the trust was to effect a conversion of his property with a view to an arrangement with his creditors, to which he himself was incompetent from the state of his health; held, that the trust deed was not  
 \*231 \*an act of bankruptcy.<sup>c</sup> So it has been held, that the conveyance of part of a trader's property in trust to sell, and dispose of the proceeds as he shall direct, was not an act of bankruptcy.<sup>d</sup> But where a trader, being importuned by a creditor, executed a conveyance of land in trust to sell and pay such creditor, with a further trust to pay debts to certain relations, the court considered it an undue preference, in contemplation of bankruptcy, and therefore an act of bankruptcy.<sup>e</sup>

Indeed, if a man makes over so much of his stock in trade

<sup>a</sup> Pulling v. Tucker, 4 B. & A. 382. (6 Eng. C. L. 455.) In this case the court said that the statute did not require that the deed should be executed in contemplation of bankruptcy; but the modern doctrine is otherwise. See Morgan v. Brundrett. Atkinson v. Brindle, *ante*, 229. This is one of the cases which the court said had gone too far.

<sup>b</sup> Carr v. Burdis, 1 C. M. & R. 443.

<sup>c</sup> Greenwood v. Churchill, 1 Myl. & K. 546.

<sup>d</sup> Robinson v. Carrington, 1 Mon. & A. 1. See also Belcher v. Prittie, 10 Bing. 408. (25 Eng. C. L. 184.)

<sup>e</sup> Morgan v. Horseman, 3 Taunt. 241.



as to disable himself from being a trader, this would be fraudulent, and would be an assignment of his solvency.\* But those who rely upon such an act of bankruptcy on a trial, must show that it was calculated to have the alleged effect, by evidence of the general state of the party's affairs at the time of such conveyance.† Therefore, where a miller gave a bill of sale of his horses, wagons and various articles of furniture to the plaintiff, and it appeared that the horses and wagons were necessary for carrying on his business as a miller; in an action against the assignees for seizing these goods under a commission of bankruptcy, Taunton, J., stated the law to be, that if a man dispose of his stock in trade, or goods and chattels, to such an extent as to disable himself from carrying on his business as a trader, and make himself insolvent, such conveyance is fraudulent. It need not be a transfer of all his goods and chattels, nor is it necessary to show that he had bankruptcy in contemplation, if he knew that in making the conveyance he became insolvent, and unable to go on with his business. He left it to the jury, whether the bankrupt in executing the bill of sale, did so disable himself from carrying on his business as a miller. A verdict having been found for the defendants, and a motion having been made for a new trial, on the ground of misdirection, and that there was no evidence of an act of bankruptcy, the court said that it was incumbent on the party who set up an act of bankruptcy \*of this description, to show the general situation of the property to have been such, that insolvency would be the effect of the transfer; but it was not stated what the whole of the trader's property amounted to; for any thing that appeared he might have had large sums of money due to him at the time of the conveyance. As the evidence was not complete, the rule was made absolute for a new trial.‡

Transfer of part will constitute an act of bankruptcy, provided insolvency would be the necessary consequence.

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7.—*Or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels.*] A gift of money is not within the meaning of this provision,§ but a bill of exchange is; and a fraudulent delivery or transfer of such bill to creditors constitutes an act of bankruptcy.¶ A fraudulent delivery of goods is not an act of bankruptcy, unless it be in the nature of a gift or transfer; therefore, where a trader removed goods to the premises of a person for safe custody, and to secure them from being taken by a creditor, but the party to whose custody they were given, had no claim given to him over them; it was held not to be an act of bank-

What constitutes a fraudulent gift or transfer.

\* Per Lord Mansfield; C. J., in *Hooper v. Smith*, 1 Bl. 442.

† *Wedge v. Newlyn*, 4 B. & Ad. 831. (24 Eng. C. L. 173.)

‡ *Abel v. Daniel*, 1 M. & M. 370. (22 Eng. C. L. 337.)

§ *Cumming v. Bailey*, 6 Bing. 363. (19 Eng. C. L. 104.) In this case the bill was inclosed in a letter to the creditor, and it did not appear that it ever came into his hands, or that he would have accepted it.



ruptcy.<sup>a</sup> A sale of a trader's property with an intent to defraud his creditors by absconding with the purchase money, does not constitute an act of bankruptcy, unless the purchaser is cognisant of, or has reasonable grounds to suspect, the fraudulent purposes of the seller.<sup>b</sup> The startling consequences which would perhaps warrant some degree of violence to the wording of the law, will be avoided by confining the epithet "fraudulent" to the gift, transfer, or delivery of goods; and not extending it to the projects which possibly the trader may entertain as to the disposal of the purchase money.<sup>c</sup> A conveyance of goods without deed is fraudulent, unless possession be given; if it be by deed, it is fraudulent, and an act of bankruptcy.<sup>d</sup>

\*233 \*8.—*Intent to defeat or delay creditors.*] "Every such trader doing, suffering, procuring, executing, permitting, or causing to be made, any of the acts, deeds, or matters aforesaid, with intent to defeat or delay his creditors shall be deemed to have thereby committed an act of bankruptcy." It is obvious from this provision that whether any of the preceding acts will constitute an act of bankruptcy, must depend on the intention with which it is done; which is a question of which the jury are to judge, from the evidence respecting the conduct or admissions of the trader. It may be here observed, that if the act be done with an intent to delay, it is immaterial whether a creditor be delayed or not.<sup>e</sup>

<sup>a</sup> Cotton v. James, M. & M. 273. (22 Eng. C. L. 305.)

<sup>b</sup> Baxter v. Pritchard, 1 Ad. & Ell. 456. (28 Eng. C. L. 124.) Cooke v. Caldecott, M. & M. 522, (19 Eng. C. L. 403,) *ante*, 228.

<sup>c</sup> Per Lord Denman, C. J., in Baxter v. Pritchard, *ante*, 228.

<sup>d</sup> Per Lord Kenyon, C. J., in Manton v. Moore, 7 T. R. 67.

<sup>e</sup> Per Abbott, C. J., in Harvey v. Ramsbottom, 1 B. & C. 60, (8 Eng. C. L. 25,) *ante*, 224.

The following summary of decisions on this subject, which has been collected in a work of much practical utility, may be found useful in this place. As to the intent, this can be evidenced only by the trader's acts or admissions. If a man admit that he committed the act with the intent of defeating or delaying his creditors in the recovery of their debts, it is almost conclusive evidence of it, and can scarcely be explained away. Rawson v. Halgh, 2 Bing. 99. (9 Eng. C. L. 335.) So if the act be accompanied by circumstances from which the intent may fairly be presumed, it will be sufficient. If a creditor be in fact delayed by the act, this of itself is no evidence of the trader's committing it. *Ex parte* Osborne, 2 Ves. & B. 177. Fowler v. Padget, 7 T. R. 509. But if the necessary consequence of the act be that his creditors must thereby be defeated or delayed, this is presumptive evidence of his intention to defeat or delay them. Ramsbottom v. Lewis, 1 Campb. 279. Holroyd v. Whitehead, 3 Campb. 530. Even although it appear he had other ostensible reasons for it. Woodier's Case, Bul. N. P. 39. Raikes v. Poreau, Cooke, 85; and *dictum*, per Lawrence, J., in Fowler v. Padget, 7 T. R. 516. So if done to avoid an arrest. Williams v. Nunn, 1 Taunt. 270. Holroyd v. Gwynne, 2 Taunt. 176. Warner v. Barber, 1 Holt, 175. (3 Eng. C. L. 66.) Cheneweth v. Hay, 1 M. & S. 676. Harvey v. Ramsbottom, 2 D. & R. 142. 1 B. & C. 55. (8 Eng. C. L. 25.) *Ex parte* Bamford, 15 Ves. 459. Even although for the purpose of gaining the term. Maylin v. Eylo, 2 Stra. 809. Or if done to avoid the importunity of creditors. Ramsbottom v. Lewis, 1 Campb. 279. Dudley v. Vaughan, *id*, 271. But see Vincent v. Prater, 4

9.—*Having been arrested or committed to prison for debt &c., shall lie in prison for twenty-one days.*] To constitute an act of bankruptcy, by lying in prison, there must be an uninterrupted imprisonment of twenty-one days. Therefore, where a trader being arrested put in bail, and afterwards surrendered in discharge of his bail; it was held that the imprisonment was to be computed from the day of the surrender, and not from the arrest.<sup>a</sup> But where a trader was sick at the time of the arrest, and could not be removed, but continued in the custody of a follower, the imprisonment was reckoned from the arrest.<sup>b</sup> \*Where a trader being arrested by a sheriff's officer on the fourth, was allowed to go at large until the eighth, when he returned into custody and was removed by *habeas corpus* into the King's Bench; held, that the act of bankruptcy

There must be an uninterrupted imprisonment of twenty-one days to constitute an act of bankruptcy. \*235

Taunt. 603. Or if done under a pretence which is false. *Capper v. Desanges*, 3 Moore, 4. Or if a trader receive his creditor, and leave his house under a pretence of going for money to pay him, but, instead of doing so, go to a billiard table, and do not return for many hours afterwards. *Bigg v. Spooner*, 2 Esp. 651. Or makes an appointment to meet and pay his creditor, and fail to keep it. *Widger, v. Browning*, 9 Dow. & R. 306. (22 Eng. C. L. 394.) These and the like are circumstances from which it may be fairly presumed that a trader's intention was to delay his creditors, for the necessary consequence of them was that the creditors must have been delayed by them.

But even were such a presumption raised by circumstances attending the act, it may nevertheless be rebutted by evidence showing that the trader did not at the time entertain the intention imputed to him; as, for instance, if he prove that upon departing the realm he left a partner behind him in England. *Ramsbottom v. Lewis*, 1 Campb. 272; or that his presence abroad was absolutely necessary, in order to look after his concerns there. *Ex parte Mutrie*, 5 Ves. 576. *Warner v. Barber*, 1 Holt, 175. (3 Eng. C. L. 66.) *Fowler v. Padget*, 7 T. R. 509. Or that previous to his departure he made arrangements that the interests of his creditors should be attended to during his absence. *Ramsbottom v. Lewis*, 1 Camp. 277. *Windham v. Paterson*, 1 Stark. 144. (2 Eng. C. L. 331.) Or that he advertised in the public papers that he was going, that his ship would sail within the month, and that he would take charge of shipments. *Ex parte Osborne*, 2 Ves. & B. 177. Or in the case of a denial to a creditor, that the creditor called on a Sunday. *Ex parte Preston*, 2 Ves. & B. 311. 2 Rose, 21. Or that he was denied because he called while the trader was at dinner or engaged in some particular business, or at any other unseasonable hour. *Smith v. Currie*, 3 Campb. 349. *Shew v. Thompson*, 1 Holt, 159. (3 Eng. C. L. 61.) *Ex parte Hall*, 1 Atk. 201. Or because the trader was sick. *Bull. N. P.* 39. Or that the creditor called at the private house of the trader, and was there desired to go to the counting-house, because the trader never received persons on business at his private house. *Round v. Byde, Cooke*, 110, 111. All these and the like circumstances may be given in evidence, to rebut the presumption of the trader's intention, arising from circumstances accompanying the act, such as those above mentioned. And the act must be done with intent to defeat or delay creditors; for if done to avoid performing a mere duty, as to avoid an arrest upon an *excommunicato capiendo*, or the service of process to enforce a decree in Chancery (unless a decree for the payment of money). *Com. Dig. Bank. (C.)* 1 Cooke, 89. Or to avoid an attachment upon an award for not delivering goods pursuant thereto. *Per Willis, C. J., in Lingwood v. Eade*, 1 Atk. 196. It will not of itself constitute an act of bankruptcy, unless accompanied by circumstances from which also an intent to defeat or delay creditors may fairly be presumed. *Arch. B. L.* 55.

<sup>a</sup> *Tribe v. Webber*, Willes, 464. *Ex parte Dufrene*, 1 V. & B. 51.

<sup>b</sup> *Stevens v. Jackson*, 4 Campb. 164. 6 Taunt. 106. (1 Eng. C. L. 325.) See *Rose v. Green*, 1 Burr. 437.

related to the eighth.<sup>a</sup> The act of bankruptcy not being completed until the expiration of the twenty-one days, does not relate back to the first day of the arrest or imprisonment, but to the last only.<sup>b</sup> The day of commitment is reckoned inclusive.<sup>c</sup> Lying in prison for the non-payment of penalties due to the crown for smuggling, has been held to be an act of bankruptcy.<sup>d</sup>

**Escape.** *Or having been arrested, &c., shall escape.*] To constitute an act of bankruptcy the escape must be against the consent of the sheriff; it must show that the prisoner meant to run away and thereby defeat his creditors. Therefore, where a prisoner being arrested in Kent, and brought up by a habeas corpus to be bailed, and was allowed by the officer to call at an attorney's office in the city of London; held, that his passing through another county by the permission of the sheriff was not an act of bankruptcy.<sup>e</sup>

### SECTION III.

#### PETITIONING CREDITOR'S DEBT.

**Amount of petitioning creditor's debt.** By the statute 6 Geo. IV, c. 16, s. 15, it is enacted, that no such commission shall be issued unless the single debt of such creditor, or of two or more persons being partners petitioning for the same, shall amount to 100*l.* or upwards, or unless the debt of two creditors so petitioning, shall amount to 150*l.* or upwards; or unless the debt of three or more creditors so petitioning, shall amount to 200*l.* or upwards; and that every

**\*236 Debt payable at a future time sufficient.** \*person who has given credit to any trader upon valuable consideration for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may so petition, or join in petitioning as aforesaid, whether he shall have any security in writing or otherwise for such sum or not.

The debt must be a legal debt in order to support a *fiat*, an equitable debt is not sufficient.

<sup>a</sup> *Barnard v. Palmer*, 1 Campb. 509. Having the benefit of the day rules is not an interruption of the imprisonment. *Soane v. Watts*, 1 C. & P. 401. (11 Eng. C. L. 436.)

<sup>b</sup> *Moser v. Newman*, 6 Bing. 556. (19 Eng. C. L. 165.) *Higgins v. M'Adam*, 3 Y. & J. 1.

<sup>c</sup> *Glassington v. Rawlins*, 3 East, 407. Under the old statutes the act of bankruptcy related to the first day of imprisonment, though a commission could not be sued out until after the expiration of the period, viz. two months. See *Gordon v. Wilkinson*, 8 T. R. 507.

<sup>d</sup> *Cobb v. Symonds*, 5 B. & A. 516. (7 Eng. C. L. 179.)

<sup>e</sup> *Rose v. Green*, 1 Burr. 437.

Therefore a husband cannot alone be a petitioning creditor where the debt was due to the wife, *dum sola*,<sup>a</sup> or where it is due to her as executrix,<sup>b</sup> but she must join in the petition; nor can the wife alone be petitioning creditor for a debt due to her as executrix; the husband must join.<sup>c</sup> But a husband alone may sue out a commission on a promissory note made to his wife before coverture; for the property vested in him solely by the marriage, and he might have sued on it.<sup>d</sup> Nor is the debt sufficient if one of the petitioning creditors be an infant.<sup>e</sup>

When husband and wife must join in the petition.

Infant.

One of two executors may be a good petitioning creditor on a debt due to the testator.<sup>f</sup> But one of several obligees or partners cannot petition *alone* on a bond or partnership debt, the others must join.<sup>g</sup> A debt due from a partnership will support a separate commission.<sup>h</sup> A debt due from an attorney for costs is sufficient, though he has not delivered a bill according to the statute.<sup>i</sup> A partner of a debtor cannot be a petitioning creditor against him, unless in cases where he could maintain an action for the debt.<sup>j</sup> Money advanced as a loan to a trader to enable him to carry on business, in the profits of which the lender was to share, has been held to be a good petitioning creditor's debt as it was not intended to form an item in the partnership accounts.<sup>k</sup>

Partners.

\*The assignee of a bond cannot be a petitioning creditor, because he has no remedy on the bond at law.<sup>l</sup> A creditor who has taken his debtor in execution cannot be a petitioner against him, because his debt is satisfied in contemplation of law, and he cannot maintain an action for the amount of it.<sup>m</sup> But if he has not taken out execution against him, though he has entered up for judgment after verdict in an action, he may sue out a fiat.<sup>n</sup> But if the claim be founded on a verdict in an action sounding in damages, such as a breach of promise of marriage, it does not become a debt until after judgment is entered, and therefore where the defendant became a bankrupt after the verdict, but before judgment, the court held, that the damages did not constitute a good petitioning creditor's debt.<sup>o</sup>

\*237 Assignee of a bond. Debtor taken in execution. After verdict with damages, but before judgment.

Taxed costs on a judgment as in a case of a nonsuit, are not a good petitioning creditor's debt, as they are recoverable by attachment only, and not by action at law.<sup>p</sup> Nor a debt barred

<sup>a</sup> Ramsay v. George, 1 M. & S. 176.

<sup>b</sup> 2 Mont. B. L. 129. Master v. Winter, Davies, 292.

<sup>c</sup> Ex parte Mogg, 2 Glyn & J., 397.

<sup>d</sup> Ex parte Barber, 1 id. 1. Neilage v. Holloway, 1 B. & A. 218.

<sup>e</sup> Ex parte Morton, Buck, 42.

<sup>f</sup> Treasure v. Jones, 1 S. N. P. 258.

<sup>g</sup> Buckland v. Newsome, 1 Taunt. 477.

<sup>h</sup> Ex parte Crisp, 1 Atk. 134.

<sup>i</sup> Ex parte Sutton, 11 Ves. 164.

<sup>j</sup> Windham v. Paterson, 1 Stark. 144. (2 Eng. C. L. 331.) Marson v. Barber, Gow. 17. (5 Eng. C. L. 444.)

<sup>k</sup> Ex parte Notley, 1 Mon. & A. 46.

<sup>l</sup> Medlicot's Case, Stra. 899. Ex parte Lee, 1 P. W. 782.

<sup>m</sup> Cohen v. Cunningham, 8 T. R. 123.

<sup>n</sup> Bryant v. Withers, 2 M. & S. 123.

<sup>o</sup> Ex parte Charles, 14 East, 197. 16 Ves. 227. 2 Ves. 257.

<sup>p</sup> Ex parte Stevenson, 1 Mon. & M'A. 262.

by the statute of limitations.<sup>a</sup> But a third person cannot raise such an objection where the bankrupt has submitted to the commission.<sup>b</sup> A sum of money awarded by arbitration is a good debt until set aside, provided the award does not appear bad on the face of it.<sup>c</sup>

**Factor.** A factor who has sold goods to the debtor in his own name, even though he has named his principal, is a good petitioning creditor, (the principal not interfering,) whether he sold on a commission *del credere* or not, for he might have sued for the amount in his own name.<sup>d</sup>

**Where a bankrupt had compounded with his creditors.** \*233 A creditor who has signed a composition deed, or been otherwise privy or assenting to it, may be a petitioning creditor.<sup>e</sup> But where an insolvent by composition deed assigned his \*property to four trustees to pay his creditors rateably, and the creditors thereby covenanted that they would not implead the insolvent or his goods; it was held, that though but two out of the four trustees executed the deed, it was nevertheless valid, and that the debts of the trustees who executed it were thereby extinguished, and could not be a good petitioning creditor's debt.<sup>f</sup>

A bankrupt who obtained his certificate under a second commission, not having paid fifteen shillings in the pound under it, cannot be a petitioning creditor, his property being vested in the assignee under the commission.<sup>g</sup> So where he has taken the benefit of the insolvent debtors' act and been bankrupt.<sup>h</sup> But the creditor of an insolvent who has taken the benefit of the act may sue out a fiat against the insolvent in respect of a debt which was included in his schedule.<sup>i</sup>

**When demands arising from bills of exchange will constitute a sufficient petitioning creditor's debt.** Interest on a bill of exchange cannot be the subject of a petitioning creditor's debt, unless expressed to be payable on the face of the instrument; for otherwise it is merely damages recoverable by action, and not a debt in law. Therefore it cannot be added to the principal to make up the necessary amount.<sup>j</sup> The indorsee of a bill of exchange may sue out a fiat against the acceptor, but the drawer, though a creditor, who has indorsed the bill cannot, for the debt was transferred by the indorsement and delivery of the bill.<sup>k</sup> A balance due upon an exchange of acceptances cannot be a good petitioning creditor's

<sup>a</sup> *Quantock v. England*, 2 Bl. 703. *Ex parte Dewdney*, 15 Ves. 479. *Gregory v. Hurrill*, 5 B. & C. 341. (11 Eng. C. L. 251.)

<sup>b</sup> *Swayne v. Wallenger*, 2 Stra. 746. *Quantock v. England*, 5 Burr. 26, 28.

<sup>c</sup> *Dawe v. Holdsworth*, Peake, 64. *Antram v. Chase*, 15 East, 209.

<sup>d</sup> *Sadler v. Leigh*, 4 Camp. 195. *Young v. Smith*, 6 Esp. 121.

<sup>e</sup> *Doe v. Anderson*, 5 M. & S. 161. But he cannot set up the deed as an act of bankruptcy. See *ante*, 225, *n. d.*

<sup>f</sup> *Small v. Marwood*, 9 B. & C. 300. (17 Eng. C. L. 385.)

<sup>g</sup> *Ex parte Robinson*, Mon. & M'A. 44.

<sup>h</sup> *Ex parte Mascarenas*, 1 Dea. & Ch. 507.

<sup>i</sup> *Jellis v. Mountford*, 4 B. & A. 256. (6 Eng. C. L. 420.)

<sup>j</sup> *Cameron v. Smith*, 2 B. & A. 305. Arch., B. L. 64.

<sup>k</sup> *Ex parte Botten*, 1 Mon. & B. 412.



debt, unless the creditor has paid his acceptances.<sup>a</sup> *A.*, *B.* and *C.* drew a bill of exchange on *D.*, for which *A.* engaged to provide when it should become due; held, that *A.*, *B.* and *C.* could not be petitioning creditors in respect of that bill, although *A.*'s engagement was made in fraud of his partners.<sup>b</sup>

A bill of exchange or promissory note operates as a debt from the date; therefore an indorsee may petition on such an instrument dated before the act of bankruptcy, though not due till after.<sup>c</sup> \*But if the creditor be the indorsee, it must appear that it was indorsed to him before the commission.<sup>d</sup> In a modern case it was decided that where the debt arose on a note indorsed, or a bill accepted by the bankrupt, evidence should be given that the indorsement or acceptance was prior to the act of bankruptcy, the mere production of the instrument bearing an earlier date being insufficient.<sup>e</sup> Where a bill was drawn by a trader in favor of a creditor, and he became bankrupt before the bill became due or was presented for acceptance; held, to be a good petitioning creditor's debt, though the amount was paid by the acceptor after the commission had been sued out.<sup>f</sup> Where the bankrupt is drawer, and the bill becomes due before the bankruptcy, proof must be given of the presentment and notice of dishonor.<sup>g</sup> But a creditor who has taken in part payment from *A.* a bill drawn by him on *B.*, who has no effects of *A.*'s in his hands, may sue out a fiat against *A.* without notice of the bill being dishonored by *B.*, the acceptor.<sup>h</sup>

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A debt consisting of promissory notes of the bankrupt for 200*l.*, purchased previously to the act of bankruptcy, from the parties at 10*s.* in the pound, has been held sufficient to support a commission.<sup>i</sup>

An *I. O. U.* bearing date before the bankruptcy of a trader, constitutes no evidence of a petitioning creditor's debt, without some proof of its existence before the bankruptcy.<sup>j</sup>

A creditor to the amount of 112*l.* previous to the bankruptcy, Where the having received 50*l.* after notice of an act of bankruptcy, was debt is re-

<sup>a</sup> *Sarrat v. Austin*, 4 Taunt. 200.

<sup>b</sup> *Richmond v. Heapy*, 1 Stark. 102. (2 Eng. C. L. 215.)

<sup>c</sup> *Glaister v. Hewer*, 7 T. R. 498, See *Anon.* 2 Wils. 135. *Macarty v. Barrow*, Stra. 949. *Brett v. Levett*, 13 East, 213.

<sup>d</sup> *Rose v. Rowcroft*, 4 Campb. 245.

<sup>e</sup> *Cowie v. Harris*, M. & M. 141. (22 Eng. C. L. 270.)

<sup>f</sup> *Ex parte Douthat*, 4 B. & A. 67. (6 Eng. C. L. 354.)

<sup>g</sup> *Cooper v. Machin*, 1 Bing. 426. (8 Eng. C. L. 367.) *Giles v. Powell*, 2 C. & P. 259. (12 Eng. C. L. 120.)

<sup>h</sup> *Bickerdike v. Bollman*, 1 T. R. 405.

<sup>i</sup> *Ex parte Lee*, 1 P. Williams, 782. But where the debtor of a bankrupt, who had been a banker, purchased his cash notes to the amount of the debt, at much less than their nominal value, after the issuing of the commission; held, that he could not set them off in an action against him by the assignees, as he had obtained them subsequently to the bankruptcy. *Hodson v. Young*, Arch. B. L. 64. But the distinction between these two cases is evident and material. In the latter case the purchase and set off of the notes would be a fraud on the other creditors; in the former case, not. *Ib.*

<sup>j</sup> *Wright v. Lainson*, 2 Mees. & Wels. 739.



duced by payments after an act of bankruptcy.

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Warrant of attorney.

Debts contracted when the party was not in trade.

Discharged by insolvent debtors' act.

Mortgage.

Accommodation bill.

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not holden to be thereby precluded from suing out a commission; for by so doing he waived his claim to the payment, and he might still retain the money in his hands for the credit of the "estate." If there was a good petitioning creditor's debt at the time of the act of bankruptcy, and also at the time of the commission, it is immaterial that payments were made, and credits given in the interim; the balance throughout continuing sufficient for a petitioning creditor's debt.<sup>b</sup> A warrant of attorney given as a security against running acceptances is a *debitum in presenti*, which will support a commission.<sup>c</sup>

Where a trader having left off business, contracted further debts, and made payment without directing the application of them; held, that such payments should be appropriated in liquidation of the old debt contracted in trade; and as the old debt was thereby reduced below 100*l.*, it was not sufficient to support a commission, for a debt to support a commission must be contracted while the party was a trader; or, if contracted before, must be *subsisting* while he was a trader.<sup>d</sup> Where a person contracted a debt, and afterwards *became a trader*, and having left off business, he afterwards committed an act of bankruptcy; held, that the debt was sufficient to support a commission.<sup>e</sup>

If a trader takes the benefit of the insolvent debtors' act, a creditor whose debt is inserted in the schedule may afterwards issue a fiat on that debt against the trader.<sup>f</sup>

Taking security of a higher nature after the act of bankruptcy, for a debt of an inferior nature contracted before, will not prevent the creditor from suing out a fiat on the original debt.<sup>g</sup> A mortgagee may sue out a fiat without giving up his security;<sup>h</sup> and where, by the mortgage deed the money is only made payable after six months' notice, and such notice not to expire before a day certain, it is nevertheless a good petitioning creditor's debt to support a fiat issued before that day.<sup>i</sup>

Where a person accepted a bill for the accommodation of a trader, before an act of bankruptcy, and after the act of bankruptcy paid the amount to the holder; held, not to be a sufficient debt to support a fiat, for until payment, the acceptor was only surety for the bankrupt; and became a creditor only by the payment, which being after the act of bankruptcy, was not sufficient.<sup>j</sup> So where the debt was contracted after the arrest, and before the debtor had lain in prison the requisite time, it was held insufficient.<sup>k</sup>

<sup>a</sup> Mann v. Shepherd, 5 T. R. 79.

<sup>b</sup> Shaw v. Harvey, M. & M. 526. (22 Eng. C. L. 374.)

<sup>c</sup> Miles v. Rawlins, 4 Esp. 194. Stark. Evid. 104.

<sup>d</sup> Meggott v. Mills, 1 Lord Raym. 286. 12 Mod. 159.

<sup>e</sup> Bailie v. Grant, 9 Bing. 121. (23 Eng. C. L. 276.) 1 Clarke & F. 238.

<sup>f</sup> Ex parte Barrington, 2 Mont. & Ayr. 255. 1 Deacon, 3.

<sup>g</sup> Ambrose v. Clindon, 2 Stra. 1042.

<sup>h</sup> Ex parte Jackson, 5 Ves. 357.

<sup>i</sup> Hill v. Harris, M. & M. 447. (22 Eng. C. L. 356.)

<sup>j</sup> Ex parte Holding, 1 Glyn. & J. 97.

<sup>k</sup> Ex parte Dagger, 1 Mont. B. L. 18.

The petitioning creditor's debt, when it is disputed, must be proved in the same manner as in an action against the bankrupt himself; therefore where it arises from a bond the attesting witness must be called, even though the obligor acknowledge the bond.<sup>a</sup> An admission of the debt by the bankrupt before his bankruptcy, is evidence,<sup>b</sup> so are entries in his books.<sup>c</sup> But an admission by the bankrupt *after* an act of bankruptcy, though before the commission, is not receivable in evidence.<sup>d</sup> The date upon a promissory note, is not even *prima facie* evidence to show that it had existence prior to the act of bankruptcy.<sup>e</sup>

SECTION IV.

ASSIGNMENT OF THE BANKRUPT'S PROPERTY.

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1.—*Statutory provisions.*] THE 6 Geo. IV, c. 16, s. 63, enacts, that the commissioners shall assign to the assignees, \*for the benefit of the creditors of the bankrupt, all the present and future personal estate of such bankrupt wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed or come to him, before he shall have obtained his certificate; and the commssioners shall also assign as aforesaid all debts due or to be due to the bankrupt wheresoever the same may be found or known, and such assignment shall vest the property, right, and interest in such debts in such assignees as fully as if the assurance whereby they are secured, had been made to such assignees; and after such assignment, neither the bankrupt nor any person claiming through or under him shall have power to recover the same, nor to make any

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Commissioners to convey the personal estate to the assignees, and debts due to the bankrupt.

<sup>a</sup> Abbott v. Plumbe, 1 Doug. 216. B. N. P. 37.  
<sup>b</sup> Brett v. Levett, 13 East, 213. Hoare v. Coryton, 4 Taunt. 560.  
<sup>c</sup> Jackson v. Irwin, 2 Campb. 50.  
<sup>d</sup> Smallcombe v. Burgess, 13 Price, 136. It was held otherwise in Brett v. Levett, and in several other cases, but the present decision was come to after a due consideration of all the authorities. See 2 Stark. Ev. 104.  
<sup>e</sup> 2 Stark. Ev. 105; where it is stated that the contrary was held in Taylor v. Kinklock, 1 Stark. 175, (2 Eng. C. L. 344,) upon a mistaken report of a case cited from memory.

release or discharge thereof, neither shall the same be attached as the debt of the bankrupt by any person according to the custom of the city of London or otherwise, but such assignees shall have like remedy to recover the same in their own names as the bankrupt himself might have had if he had not been adjudged bankrupt.

To convey the bankrupt's real estate.

Sec. 64 enacts that the commissioners shall by deed indented and enrolled in any of his majesty's courts of record, convey to the said assignees, for the benefit of the creditors as aforesaid, all lands, tenements and hereditaments, except copy or customaryhold, in England, Scotland, Ireland, or in any of the dominions, plantations, or colonies belonging to his majesty, to which any bankrupt is entitled, and all interest to which such bankrupt is entitled in any of such lands, tenements or hereditaments, and of which he might, according to the laws of the several countries, dominions, plantations, or colonies, have disposed, and all such lands, tenements, and hereditaments, as he shall purchase, or shall descend, be devised, revert to, or come to such bankrupt before he shall have obtained his certificate, and all deeds, papers, and writings respecting the same, and every such deed shall be valid against the bankrupt and against all persons claiming under him: provided, that where according to the laws of any such plantation or colony, such deed would require registration, enrolment, or recording the same shall be so registered, enrolled, or recorded according to the laws of such plantation or colony, and no such \*deed shall invalidate the title of any purchaser for valuable consideration prior to such registration, enrolment or recording, without notice that the commission has issued.

Proviso as to registration of conveyance of colonial property.

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Personal estate to vest in assignees without deed of assignment.

By 1 & 2 W. IV, c. 56, s. 25, when any person hath been adjudged a bankrupt, all his personal estate and effects, present and future, which by the laws now in force may be assigned by commissioners acting in the execution of a commission against such bankrupt shall become absolutely vested in and transferred to the assignees or assignee for the time being, by virtue of their appointment, without any deed of assignment for that purpose, as fully to all intents as if such estate and effects were assigned by deed to such assignees and the survivor of them; and as often as any such assignee shall die, or be lawfully removed, and a new assignee duly appointed, all such personal estate as was then vested in such deceased or removed assignee shall by virtue of such appointment vest in the new assignee, either alone or jointly with the existing assignees, as the case may require, without any deed of assignment for that purpose.

Real estate to vest without assignment.

By s. 26, where any person shall have been adjudged a bankrupt, all such present and future real estate of such bankrupt, whether in the United Kingdom of Great Britain and Ireland, or in any of the dominions, plantations, or colonies belonging to his Majesty, as by the said recited act is directed

to be conveyed by the commissioners to the assignees, shall vest in such bankrupt's assignee or assignees for the time being, by virtue of his or their appointment without any deed of conveyance for that purpose; and as often as any such assignee or assignees shall die, or be lawfully removed or displaced, and a new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed shall by virtue of such appointment vest in the new assignee or assignees, either alone or jointly with the existing assignees, as the case may require, without any conveyance for that purpose.

By the foregoing provisions not only estates in possession, but also estates in remainder and reversion pass to the assignees; a term for years is also included; but the assignees may take possession of it or not, according as they deem it advantageous. \*But if they do no act to manifest their acceptance of it, the effect of the assignment is suspended. and the term is vested in the bankrupt until they make their election.\* Formerly the bankrupt possessed of a term of years was liable to be sued by the lessor for non-payment of rent during the term, whether the assignees took possession or not.

\*244

But by 6 Geo. IV, c. 16, s. 75, any bankrupt entitled to any lease or agreement for a lease, if the assignees accept the same shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained; and if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor or such person agreeing to grant a lease within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid; and if the assignees shall not (upon being thereto required) elect whether they will accept or decline such lease or agreement for a lease, the lessor or person so agreeing as aforesaid, or any person entitled under such lessor or person so agreeing shall be entitled to apply by petition to the Lord Chancellor, who may order them so to elect and to deliver up such lease or agreement, in case they shall decline the same, and the possession of the premises, or may make such other order therein as he shall think fit.

Bankrupts entitled to leases, &c. when not liable for rents or covenants.

2.—*Property in the possession, order, and disposition of the bankrupt.*] By the 6 Geo. IV, c. 16, s. 72, if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels,<sup>b</sup> whereof he

Goods in the possession, order, or disposition of the

<sup>a</sup> Copeland v. Stevens, 1 B. & A. 593.

<sup>b</sup> "Goods and chattels" means all personal property, the title to which is evidenced by possession. Per Best, J., in Hornblower v. Proud, 2 B. & A. 335. Bills of exchange are within the statute. Hornblower v. Proud, 2 B. & A. 327. So are choses

bankrupt, was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall may be disposed of by the commissioners. have power to sell and dispose of the same for the benefit of the creditors under the commission: provided that nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment duly registered according to the provisions of an act of parliament made in the fourth year of his present majesty, intituled, an act for the registering of vessels. c. 41.

\*246 The object of this enactment was to prevent a trader's obtaining false and delusive credit by the possession of the \*goods of another; and if by having such possession, the trader gain false credit, the goods are to be distributed under this act to those who may be supposed to have given him credit.\* "Questions arising from this clause have more of fact than of law in them. The sort of possession, disposition &c., are facts to be proved, and for the consideration of the jury."b "When once it is ascertained whether the bankrupt was the reputed owner or not, there would be very little difficulty in deciding. From that reputed ownership false credit arises; from that false credit arises the

in action. Ryall v. Rolle, 1 Wils. 260. 1 Atk. 165. 1 Ves. 348. In this case it was held that a mortgage of a moiety in a brewhouse, goods and chattels, and debts in trade, was fraudulent as against creditors, if the goods, &c., were not delivered into the possession of the mortgagee. Debts are within this provision. *Id.* *Ex parte* Burton, 1 Glynn & J. 207. So are shares in a public company; Nelson v. London Ass. Co., 2 S. & S. 292; and in a newspaper. Longman v. Tripp, 2 N. R. 67. I remember a case before Lord Mansfield, in which the advantage of a newswalk was held to be assets upon a plea of *plene administravit*, and I dare say that such an interest has often been sold under commission of bankrupt. Per Mansfield, C. J., *id.* Government stock is within the statute. *Ex parte* Richardson, Buck. 480. Brown v. Bellairs, 5 Madd. 53. So are policies of insurance. Falkner v. Case, 1 Br. C. C. 125. Smith v. Smith, 2 C. & M. 231. And utensils of trade; Lingard v. Messiter, 1 B. & C. 308; (8 Eng. C. L. 83;) unless they are let where it is the usage to let them. Horn v. Baker, 9 East, 215. Storer v. Hunter, 3 B. & C. 368. (10 Eng. C. L. 115.) Coombes v. Beaumont, 5 B. & Ad. 72, (27 Eng. C. L. 38,) *post.* 256. "For that usage rebuts the presumption of a reputed ownership arising from the possession of the article." Per Parke, J., *id.* 76. But things savoring of the realty and fixed to the freehold, are not within the meaning of the statute. *Id.* "Property affixed to the freehold is not within the intent of the statute, because the possession of such property does not create a visible ownership in the bankrupt so as to procure him credit." Per Littledale, J., *id.* 77. In *ex parte* Austin, 1 Dea. & Chitt. 207, Sir George Rose said that where fixtures are capable of removal by an outgoing tenant without injury to the freehold, they are in the *order* and *disposition* of such tenant within the bankrupt law; but the contrary has been decided in *Boydell v. Michael*, 1 C. M. & R. 179. Shares in the Vauxhall bridge company, who are seised of a real estate, have been held not to be goods and chattels. *Ex parte* Vauxhall Bridge Co., 1 Glynn & J. 101. But where the shares of a canal company were by act of parliament declared to be personal property and transmissible as such, it was held that they were goods and chattels within the meaning of the statute. *Ex parte* Lancaster Canal Co., 1 Dea. & Chitt. 411.

\* Per Grose, J., in *Gordon v. the East India Co.*, 7 T. R. 236.

b Per Baller, J., in *Walker v. Burnell*, Doug. 320.



mischief: and to that mischief the remedy of the statute applies.”<sup>a</sup>

In actions brought by assignees of a bankrupt to recover property possessed by a bankrupt as reputed owner; it lies upon them to show in the first instance that the bankrupt was the reputed owner at the time of his act of bankruptcy.<sup>b</sup>

“There are two classes of cases where property demised to the bankrupt has been held to pass to his assignees; the first is where the bankrupt has been once the owner, the other where he has not. The evidence required to establish reputed ownership in each of these cases is different. In the former case, when it is once proved that the bankrupt has been the owner, and has continued in possession until the time of the act of bankruptcy, the presumption is, that he then continued in possession in the character of owner, and therefore proof of those facts is *prima facie* evidence that he is both reputed owner and real owner. In the latter case the mere possession of the things demised may not, of itself, be sufficient to show that the bankrupt was the reputed owner of them; and it may then be necessary for the assignees to establish that fact by other circumstances.”<sup>c</sup> \*247

A few instances will serve to illustrate the positions here laid down:—

Trover for machinery by the assignees of a bankrupt, the plaintiffs proved at the trial that the bankrupt was originally possessed of the machinery in question, and continued to use it in his business down to the time of the act of bankruptcy. The defendant's evidence was that, long before the bankruptcy, the goods had been seized in execution at the suit of a creditor, and conveyed by bill of sale to the creditor, who afterwards demised them at an annual rent to the bankrupt. Soon after the bill of sale was executed, the creditor's initials were marked on the goods. Held, that this was no evidence of the notoriety of the change of property, and consequently that there was no evidence to go to the jury that the bankrupt had ever ceased to be the reputed owner. “The question of reputed ownership,” said Mr. Justice Bayley, “generally speaking, is a question of fact for the jury; but when once it is proved in an action brought by the assignees of the bankrupt that the latter, who was the former owner of the goods continued in possession of them till the time of his act of bankruptcy, it must be taken that he continued in possession as owner until that time, unless it be shown by

Goods seized in execution and allowed to remain in the possession of the debtor.

<sup>a</sup> Per Eyre, C. J., who recognised the above *dictum* of Buller, J., in *Lingham v. Biggs*, 1 Bos. & Pul. 89.

<sup>b</sup> It may be here observed that the statute does not apply to property which comes in the possession of the bankrupt after the act of bankruptcy. *Lyon v. Weldon*, 2 Bing. 334. (9 Eng. C. L. 424.)

<sup>c</sup> Per Bayley, J., in *Lingard v. Messiter*, 1 B. & C. 312. (8 Eng. C. L. 85.)



the defendant not only that there was a change of ownership, but that the change of ownership had become notorious to the world."<sup>a</sup>

On the same principle, where a plaintiff levied execution on the goods of a trader, but desired the officer to leave a man in possession with the warrant and not to sell, the trader was allowed to carry on his trade as usual, and in five months afterwards became a bankrupt; held, that notwithstanding the execution and possession of the officer, the goods passed to the assignees.<sup>b</sup>

\*248  
Assign-  
ment of  
privilege  
of ship-  
ping  
goods.

\*Where *A.*, a trader and an officer in the East India service, assigned his privilege of shipping goods from the East Indies to England to *B.*, for a valuable consideration; and in order to evade the by-laws of the company, which prohibit such assignment, the goods were shipped, entered, and sold by the company in *A.*'s name, and the proceeds carried to his account, but before *A.* received these proceeds from the company, he became a bankrupt; held, that the assignees might recover the amount from the company in an action for money had and received; for the bankrupt had the order and disposition as well as the possession of it within the meaning of the statute.<sup>c</sup>

Assign-  
ment of in-  
terest in a  
news-  
paper.

So where the furniture of a coffee-house had been taken in execution, and a bill of sale thereof made out to the creditor, who let them to the keeper of the coffee-house at a yearly rent for four years, who continued in possession until he became a bankrupt.<sup>d</sup> So where a trader who was the printer and publisher of a newspaper, assigned his interest in it to a creditor, but by agreement between them continued to print and publish as before, and no affidavit of a change in interest was delivered at the stamp office; held, that the trader having become a bankrupt, the interest in the newspaper passed to his assignees.<sup>e</sup>

Where the  
landlord  
distrained,  
and left  
the goods  
on the pre-  
mises.

So where the landlord distrained for arrears of rent and took the goods on appraisement, and left them on the premises for the use of the bankrupt's wife, the bankrupt being in prison, and after an act of bankruptcy, again distrained for some arrears of rent; held, that the second distress was void, and that the goods passed to the assignees.<sup>f</sup>

Sale of a  
plant, and  
continu-  
ing in pos-  
session.

Where *A.*, a dyer, having purchased a plant of *B.*, resold it to him, and *B.* never took actual possession, but demised it to *A.* for three years; *A.* having become a bankrupt while the plant was thus in his possession; held, that it passed to his assignees.<sup>g</sup> Where *A.*, who kept a public house, asserted that

<sup>a</sup> *Id.*

<sup>b</sup> *Toussaint v. Hartop*, Holt, 338. (3 Eng. C. L. 122.) *Jackson v. Irvine*, 2 Campb. 48.

<sup>c</sup> *Gordon v. the East India Co.*, 7 T. R. 298.

<sup>d</sup> *Lingham v. Biggs*, 1 B. & P. 82.

<sup>e</sup> *Longman v. Tripp*, 2 N. R. 67.

<sup>f</sup> *Ex parte Shuttleworth*, 1 Dea. & Ch. 223.

<sup>g</sup> *Bryson v. Wylie*, 1 B. & P. 83, n. 1.

she was married to *B.*, and entered his name at the excise office, with a note in the margin "married," and *B.* afterwards had the license and continued in possession of the house and goods until he became bankrupt; held that *A.* could not claim the goods as her own on the ground that she was not married to *B.*, after having asserted that she was married to him.<sup>a</sup> \*249

Where goods bought and paid for are allowed to remain with the vendor until his bankruptcy, undistinguished from the remainder of his stock, they will pass to his assignees; therefore, if a person buying wine of a merchant, permits it to remain in his cellar, though for the purpose of ripening, and the merchant becomes a bankrupt, the assignees are entitled to the wine.<sup>b</sup> Goods in a bonded warehouse were sold by the owner, who received payment, and afterwards became a bankrupt before the goods were removed; held, that though the buyer's initials had been marked upon them, they passed to the assignees.<sup>c</sup> Goods bought and left with the vendor.

But where wine sold by the bankrupt, was bottled and deposited in the bankrupt's cellar, and set apart in a particular bin marked with the purchaser's seal, and entered in the bankrupt's books as the property of the purchaser; held, that they were not in the order and disposition of the bankrupt, within the meaning of the statute.<sup>d</sup> Goods bought, set apart, and marked.

Where a person purchased hops of a hop-merchant, and allowed them to remain in his warehouse for resale, at a rent, undistinguished from his stock, it being the custom of the trade to do so; held, that the merchant having become bankrupt, the hops passed to his assignees.<sup>e</sup> Where a lessee purchased fixed and moveable implements, &c., and agreed to give them up to the lessor at the determination of the term, at a valuation; he afterwards assigned them to a creditor in trust, in case of default in the lessee to pay certain instalments, to sell the same, and reassign the residue after satisfying himself out of the proceeds. The lessee made default and afterwards became bankrupt, after which, and during the term, the creditor entered; held, that the moveables passed to the assignees, as the creditor did not act pursuant to the mortgage deed.<sup>f</sup> \*250

Where *A.*, a brewer, being in partnership with *B.*, mortgaged a moiety of the stock in trade, debts, &c., to *C.* in trust for *B.*, but continued in possession and acted as *B.*'s partner until he, Mortgagor of stock in trade con-

<sup>a</sup> *Mace v. Cadell*, Cowp. 232.

<sup>b</sup> *Tanner v. Barnett*, Peake, Add. Cas. 98.

<sup>c</sup> *Knowles v. Horsfall*, 5 B. & A. 134. (7 Eng. C. L. 46.) See *Jones v. Dwyer*, 15 East, 21.

<sup>d</sup> *Ex parte Marrable*, 1 Glyn. & J. 402.

<sup>e</sup> *Thackwaite v. Cock*, 3 Taunt. 487.

<sup>f</sup> *Clark v. Crownshaw*, 3 B. & Ad. 804. (23 Eng. C. L. 190.) But where *A.* sold a house and furniture to *B.* at a certain sum, and it was agreed that *A.* should be allowed to continue in the possession of the house and furniture for three months afterwards, which agreement was notorious in the neighborhood; held, that *A.* having become bankrupt within the three months, the furniture did not pass to his assignees, for he was not the reputed owner. *Muller v. Moss*, 1 M. & S. 335.

tinuing in possession. *A.* became a bankrupt; held, that *A.*, having continued in possession after the mortgage as visible partner, had the order and disposition of the chattels, and was one of the reputed owners as much as *B.*<sup>a</sup>

Partnership goods in the possession of one of the partners. But the goods of a partnership in the possession of one of the partners, who alone conducts the business, will not be considered to be in his sole possession, order, or disposition, so as to pass the whole property in them to the assignees upon his bankruptcy, even though the others be secret partners. The bankrupt having such a qualified property in the secret partners' share as to destroy the essential requisites of a true and independent ownership on the one hand, and of a fraudulent and reputed ownership on the other.<sup>b</sup> Where, however, after the dissolution of partnership by effluxion of time, the partnership effects remained in the order and disposition of *A.* one of the partners, who alone had conducted the business, (*B.* the other, being a dormant partner,) and after having thus continued the trade for two years *A.* became a bankrupt; held, that *B.*'s share of the partnership's effects, and of the debts due on the partnership account at the time of the dissolution, passed to *A.*'s assignees as being in the order and disposition of *A.*<sup>c</sup>

\*251 \*The presumption arising from property which was originally the bankrupt's continuing apparently in his possession at the time of the bankruptcy, may in some cases be rebutted by showing that there was such a transfer of possession by the bankrupt as the nature of the case would admit of, or such as is considered sufficient according to the usage of trade.

A symbolical delivery of goods is a sufficient transfer. Thus, where a trader having contracted with a canal company to build locks and bridges on the canal, purchased timber and other materials for the purpose, which were laid on the company's premises on the banks of the canal, and on the company's advancing money to him they took a bill of sale of these goods, and a symbolical delivery of them by a halfpenny; afterwards the company seized the goods under an execution, and the trader became a bankrupt; held, that his assignees were not entitled to these goods, as the best delivery was given that the nature of the goods would admit of, they being before on the company's premises.<sup>d</sup> So, if a trader sell a cargo of goods at sea, a delivery of the bill of lading will be deemed a sufficient transfer, being the only delivery which the nature of the case will admit of.<sup>e</sup> Where property is assignable by the

Bill of lading.

<sup>a</sup> *Ryal v. Rowle*, 1 Wils. 260. 1 Ves. 248-373.

<sup>b</sup> *Coldwell v. Gregory*, 1 Price, 119. 2 Rose, 149. See *ex parte Wilson*, Buck. 48. This case seems to have been overruled by the two following decisions: "I could not have signed the certificate in *re Gilpin*, (*infra*,) unless I had satisfied myself that the decision in *Coldwell v. Gregory*, cannot be supported" Per Best, J., in *Smith v. Watson*, 2 B. & C. 402-12. (9 Eng. C. L. 127.) *Ex parte Dyster*, 2 Rose, 256.

<sup>c</sup> *Ex parte Enderby*, in *re Gilpin*, 2 B. & C. 389. (9 Eng. C. L. 122.)

<sup>d</sup> *Manton v. Moore*, 7 T. R. 67.

<sup>e</sup> *Brown v. Heathcote*, 1 Atk. 160. See also *Atkinson v. Maling*, 2 T. R. 462.

transfer of tickets, delivery orders, or warrants, the possessor of such tickets or warrants is the reputed owner, although there be no actual transfer of the goods.<sup>a</sup> If such goods, however, continue in the possession of the vendor, he has a lien on them for the price, for as between the vendor and the vendee, the delivery order does not operate as a complete transfer.<sup>b</sup>

3.—*Goods of other persons in possession with the consent of the true owner.*] Where a carriage had been built to the order of a customer and paid for by him, but was left at the maker's for some addition to be made to it; before the required improvements had been made, the customer frequently sent for it, and \*the maker promised to send it. At length the customer, being dissatisfied with it, ordered it to be sold, and it remained exposed for sale in the maker's shop when he became a bankrupt; held, that his assignees were not entitled to it as it was not in the order or disposition of the bankrupt with *the consent of the true owner.*<sup>c</sup> So where three pipes of wine, the property of *A.*, had been deposited in the cellars of *B.*, and remained in his possession as the reputed owner thereof with the consent of *A.* until the day before *B.*'s bankruptcy, when *A.*'s agent, apprehensive of *B.*'s insolvency, demanded the wine to be delivered up to him, upon which *B.* said, It was an unfortunate affair, he feared it would go to a bankruptcy, and that he did not know how he could act without consulting his attorney, but that to give up the wine would be showing an undue preference. The wine was not given up, and on the following day *B.* committed an act of bankruptcy. Held, that the wine was not in his possession with the consent of the true owner, and consequently that it did not pass to his assignees.<sup>d</sup> So where a foreign merchant employed an agent in England to sell wines for him on commission, but the agent sold the wines in his own name. The merchant having closed accounts with the agent, demanded the wines to be delivered up, but before that was done the agent became a bankrupt, while some of the wines were in the dock in his own name. Held, that those wines did not pass to his assignees.<sup>e</sup>

Possession without the consent of the true owner gives no right to the assignees.  
\*252

Where the mortgagor of collieries and machinery retained possession with the permission of the mortgagee, and underlet them to a third person, who took possession and became a bankrupt; held, that they were not in the possession of the

The mortgagee is the "true owner" of

*Lempriere v. Pasley*, *id.* 485. *Richardson v. Campbell*, 5 B. & A. 196; (7 Eng. C. L. 66;) and several other cases establishing the same principle in Arch. B. L. 183.

<sup>a</sup> See *Tucker v. Ruston*, 2 C. & P. 86. (12 Eng. C. L. 38.) *Lucas v. Dorian*, 1 Moore, 29. (2 Eng. C. L. 105.) *Ridout v. Lloyd*, Mon. 103. *Greening v. Clarke*, 4 B. & C. 316. (10 Eng. C. L. 341.)

<sup>b</sup> *Townley v. Crump*, 5 N. & M. 606. 1 H. & W. 564. *Miles v. Gorton*, 2 C. & M. 504. 4 Tyr. 295.

<sup>c</sup> *Carruthers v. Payne*, 5 Bing. 270. (15 Eng. C. L. 447.)

<sup>d</sup> *Smith v. Topping*, 5 B. & Ad. 674. (27 Eng. C. L. 152.) 2 N. & M. 421.

<sup>e</sup> *Ex parte Moldant*, 3 Dea. & C. 351.

mortgaged bankrupt with the permission and consent of the true owner, property. for the mortgagee was the true owner within the meaning of the statute, and the legal right was vested in him.<sup>a</sup> So where

\*253 stock, which was mortgaged, was transferred by the Accountant-General (in whose name it stood) into the name of the mortgagor, \*without the consent of the mortgagee; held, that it did not pass to the assignees of the mortgagor, it not being in his possession with the consent of the true owner.<sup>b</sup>

A trustee is the "true owner" of trust property.

Where a woman before her marriage, with the consent of her intended husband, conveyed all her stock in trade and furniture to trustees, to enable her to carry on her business separately, it was held, the husband not having meddled with them, and there being no fraud, that such effects (though fluctuating) were not liable to his debts on his becoming bankrupt, on the ground that the husband had not the order and disposition of the property with the consent of the real owner, for the trustee was the real owner, and he gave no consent for such purpose.<sup>c</sup>

Wharfinger.

Where the owner of deals sent them to a wharf for sale, and sent his servant to sell them as he could get customers, held that the deals did not pass to the assignees of the wharfinger.<sup>d</sup>

Coach-maker.

So where an innkeeper borrowed an old chaise from a coach-maker, and used it in his trade while he had a new one making; held, that it did not pass.<sup>e</sup>

A horse let on hire.

*W.*, a horse contractor, lets out a cart-horse on hire to *N. and Co.*, who have it in their possession more than twelve months and then become bankrupt; held, that it does not pass to their assignees as being in their

Husband and wife.

reputed ownership.<sup>f</sup> Furniture settled to the separate use of a wife, the possession being consistent with the settlement, is not in the reputed ownership of the husband.<sup>g</sup>

Possession with the consent of the true owner.

Where the trustee of an infant sold the lease of a brewhouse and the plant, and let the purchaser into possession before payment, who afterwards became bankrupt; held, that he was in possession with the permission of the true owner, for the legal estate was vested in the trustee.<sup>h</sup> Where skins were sent to a tan-yard to be dressed, and were sent with an account as a sale

\*254 to the tanner, and he was accustomed to return \*them when dressed with an account as a sale to the customer; the tanner having become bankrupt while part of the skins were mixed with his own; held, that they passed to his assignees.<sup>i</sup> Where an hotel-keeper took a house on lease and hired the furniture

<sup>a</sup> *Fraser v. Swansea Canal Co.*, 1 Ad. & Ell. 354. (28 Eng. C. L. 105.) 3 N. & M. 391.

<sup>b</sup> *Ex parte Richardson*, Buck. 480. See *Darby v. Smith*, 8 T. R. 82.

<sup>c</sup> *Jarman v. Woolloton*, 3 T. R. 618; recognised by Bayley, J., in *Shaftesbury v. Russell*, 1 B. & C. 673. (8 Eng. C. L. 178.)

<sup>d</sup> *Boddy v. Esdaile*, 1 C. & P. 62. (11 Eng. C. L. 314.)

<sup>e</sup> *Newport v. Hollings*, 3 C. & P. 223. (14 Eng. C. L. 279.)

<sup>f</sup> *Ex parte Wiggins*, 2 Dea. & Ch. 269.

<sup>g</sup> *Ex parte Massey*, 2 Mont. & Ayr. 173. 4 Dea. & Ch. 405.

<sup>h</sup> *Ex parte Dale*, Buck. 265.

<sup>i</sup> *Ex parte Batten*, 3 Dea. & Ch. 328.



at a rent, and covenanted that the lease should be void, and that the landlord should resume possession of the furniture on the lessee's committing an act of bankruptcy; the jury having found that he was the reputed owner of the furniture, the court held, that the private contract between him and his landlord did not prevent it vesting in his assignees.<sup>a</sup>

Where goods were in the hands of a retail dealer at the time of his bankruptcy *on sale or return*; held, that they passed to his assignees, for he was to "sell them, not as a factor, but as a principal;" and they appeared to the world as his property.<sup>b</sup> But where goods were sent to a trader on sale or return, with a letter requesting him to return such of them as he did not approve of as soon as possible, and the day after they had arrived he committed an act of bankruptcy; held, that they did not pass to his assignees, as he should have been allowed a reasonable time to have selected such goods as he was disposed to retain.<sup>c</sup> And where goods are delivered to a bankrupt to sell in the name of another, his selling them in his own name does not place them in his reputed ownership.<sup>d</sup>

A coal merchant at the time of his bankruptcy had in his possession barges which bore his own name and number, and were registered in his name under the Waterman's act. These barges he hired of the defendant. It being the custom for coal merchants to hire barges and to paint on them the name of the hirer; upon a question whether the barges passed to the coal merchant's assignees under his bankruptcy; held, that it was properly left to the jury to find whether the custom was generally notorious in the coal trade; and that it was not necessary to direct them to inquire whether the custom was notorious to the world at large.<sup>e</sup>

4.—*Fixtures and utensils.*] *A.* and *B.* were partners in a distillery and used in common in the trade, the stills, vats and utensils necessary for carrying it on, which were the property of *A.* On a dissolution of partnership, it was agreed that *A.* should retire, and that *B.* and one *C.* should carry on the business on the premises paying a certain annuity to *A.* for the use of the vats, fixtures, utensils, &c. *B.* and *C.* continued to carry on the business until their bankruptcy, after which a question arose whether the vats and other utensils used by them in the trade and hired from *A.* had passed to their assignees; the court held, that the stills which were *fixed* to the *freehold* did not pass, but that the moveable utensils did. Lord

Hired barges.  
Known custom.  
\*255

Possession of moveable utensils carries the reputed ownership if there be not a known usage in the trade to hire such articles.

<sup>a</sup> Hickenbotham v. Grove, 3 Car. & P. 492.

<sup>b</sup> Livesey v. Hood, 2 Camp. 84.

<sup>c</sup> Gibson v. Bray, 8 Taunt. 76. (4 Eng. C. L. 23.) 1 Moore, 519; otherwise, if he had kept them a long time without making a selection. Neate v. Ball, 3 East, 117.

<sup>d</sup> Ex parte Carlow, 5 Mont. & Ayr. 39. 4 Dea. & Ch. 120.

<sup>e</sup> Watson v. Peache, 1 Bing. N. C. 327. (27 Eng. C. L. 406.) 1 Scott, 149.



Ellenborough, C. J. observed, "that with regard to the vats and other utensils there was nothing in the case to rebut the reputed ownership following the possession of the bankrupts after the dissolution of the old firm; as between the parties to the contract the new partners (the bankrupts) could not sell or dispose of the property, but as to the world in general, they appeared to have the same right over it which the former partners had. Had they not then the reputed ownership? If, as in some manufactories, where the engines necessary for carrying on the business are known to be let out to the several manufacturers employed upon them, there had been a known usage in this trade for distillers to rent and hire vats and other articles used by them for the purpose of distilling, the possession and use of such articles would not have carried the reputed ownership. But in the absence of such usage there is nothing stated in the case which qualifies the reputed ownership arising out of the possession and use of the things in their trade."<sup>a</sup>

Fixtures  
do not  
pass to the  
assignees.  
\*256

So where a trader took a lease of a mill and iron forge, and bought the fixed and moveable implements, &c., under an agreement that they should be delivered up to the lessor at a valuation at the determination of the term. The trader having become a bankrupt, the court held, on the authority of the preceding case that the fixtures did not pass to the assignees as goods and chattels, but that the moveable implements did;<sup>b</sup> and on the same principle, a steam engine erected for the purpose of working a colliery to be used by the lessee of such colliery during his term, but to be held as the property of the landlord, has been held to pass to the assignees of the lessee.<sup>c</sup> So where the steam engine of a cotton mill was mortgaged, and left in the possession of the mortgagor until he became a bankrupt; held, that it did not pass to his assignees, though the principal part of the utensils was secured by bolts and screws, and might be removed without injury to the premises, and consequently might be removed by the tenant.<sup>d</sup>

The pos-  
session of  
imple-  
ments  
which it is  
customary  
to demise,  
does not

Where the lessee took a colliery, and all the engines, machinery and other implements used therewith for twenty years and the lease contained a proviso, that on the determination of the demise, the lessee should give up to the lessor all the engines, machinery, &c. used in the colliery. The lessee entered to demise, and the lease having become forfeited by non-payment of rent the lessor recovered judgment in ejectment; after which, but

<sup>a</sup> Horn v. Baker, 9 East, 215.

<sup>b</sup> Clark v. Crownshaw, 3 B. & Ad. 804, (23 Eng. C. L. 190,) ante, 250.

<sup>c</sup> Coombs v. Beaumont, 5 B. & Ad. 72. (27 Eng. C. L. 38.) 2 N. & M. 235.

"This was determined in the case of Horne v. Baker; and since that case, as far as my experience goes, I never knew that any distinction was made between such fixtures as would be removable between landlord and tenant and such as would not." Per Parke, J., *id.*

<sup>d</sup> Hubbard v. Bagshaw, 4 Simons, 326. See also to the same effect, *ex parte* Wilson, 3 Mon. & A. 61. *Ex parte* Lloyd, 1 *id.* 494. *Ex parte* Belcher, 2 Mon. & A. 160.

before the judgment was executed, the lessee became a bankrupt. It appeared *that it was customary for landlords to demise the machinery, &c., together with the colliery, and to take them back with the colliery when the tenancy expired; held, that the engines, machinery, &c., did not pass to the assignees of the bankrupt, for he never had the absolute ownership of them; he had merely a qualified property in them, subject to the terms of the lease; consequently, he had not any reputed ownership.* This case was distinguishable from *Horne v. Baker*, inasmuch as there *it was not the usage* to demise utensils which necessarily belonged to a distillery; whereas in collieries such *usage* was prevalent, and therefore the mere possession of such things was no evidence of reputed ownership.<sup>a</sup>

carry the  
reputed  
ownership

\*257

Where machinery used by calico printers, which was fixed to the freehold, but which could be removed without material injury to the buildings, and was constantly bought and sold distinctly from the freehold in that part of the country, was together with the fixtures, in the reputed ownership of a trader at the time of his bankruptcy; and it appeared that "the premises and fixtures" had previously been mortgaged by him, and that the machinery was not considered as included in those terms; held, that the machinery was personal property and passed to the assignees of the bankrupt.<sup>b</sup>

Machine-  
ry distinct  
from the  
freehold.

Where *A.* took the lease of a house and premises for a term of years, and took the tenant's fixtures in the house at a valuation from the landlord, and afterwards assigned the term to *B.* by way of mortgage, expressly including the fixtures, and subsequently became bankrupt; held, that the fixtures were not goods and chattels within the order and disposition of the bankrupt and did not pass to his assignees.<sup>c</sup>

5.—*Choses in action.*] Under the statute 1 Jac. I, c. 15, s. 13, the assignment of debts due to the bankrupt was expressly provided for, which provision is continued in the 63d section of the 6 Geo. IV, and sec. 72, as we have seen, embraces choses in action. Under the former statutes it was decided that the right to bring a real action passed to the assignees as an hereditament.<sup>d</sup> So the right to recover money lost at play under the 9 Ann, c. 14.<sup>e</sup> No action will lie, however, by assignees for a mere personal tort to the bankrupt as assault or slander.<sup>f</sup>

What  
right of ac-  
tion passes  
to the  
assignees.

Upon the assignment of a simple contract debt, the assignor must be considered as having the order and disposition of the

Notice of  
the as-  
signment.

<sup>a</sup> *Storer v. Hunter*, 3 B. & C. 368. (10 Eng. C. L. 115.)

<sup>b</sup> *Trappes v. Harter*, 2 C. & M. 153. See *Crawfoot v. The London Dock Company*, 2 C. & M. 637. 4 Tyr. 967.

<sup>c</sup> *Boydell v. M'Michael*, 1 C. M. & Ros. 177. 3 Tyr. 914.

<sup>d</sup> *Smith v. Coffin*, 2 H. Bl. 444.

<sup>e</sup> *Brandon v. Pate*, *ib.* 308.

<sup>f</sup> *Benson v. Flower, Jones*, 215. *Eden*, 235.

\*258 debt, with the consent of the true owner, until the debtor has notice of the assignment, for the debtor would be discharged by payment to the assignor, without notice as the latter would be in the apparent ownership of the debt; notice is only necessary for the collateral purpose of putting an end to the apparent ownership;<sup>a</sup> and an allegation in the declaration of assignment to the assignee does not imply notice to the debtor, (such notice should be specially averred,) because the interest vests immediately in the assignee on the execution of the deed without notice to the debtor.<sup>b</sup>

Where the owner of shares in an insurance company assigned them by way of mortgage and gave notice to the company but owing to some informality in the assignment the company did not recognise it, and the shares continued in the bankrupt's name; held, notwithstanding, that they were not in his reputed ownership.<sup>c</sup> Where the agent of the assignee of a policy of insurance went to pay the annual premium, and told a clerk in the office of the assignment; held, not sufficient notice to the insurance office.<sup>d</sup>

An equitable mortgagee of two policies of assurance, which the bankrupt had effected on his own life, writes to the insurance office, saying, "I am holder of the undermentioned policies," stating particulars of the policies in question, and inquiring what sum the office would give if they were delivered up to be cancelled; held, that this was a sufficient notice of a change of ownership.<sup>e</sup>

\*259 *A.* made advances to *B.*, a trader, and afterwards took from him, as a security, an assignment of an equitable life interest in stock and other property standing in the name of, and vested in, three trustees under a marriage settlement. There being rumors about the insolvency of *B.*, *A.* in the course of conversation, subsequently to the assignment, and not with a view of giving validity to his security, mentioned to one of the trustees, who was not the acting trustee, that he was secured by the assignment; held, that this communication was a sufficient notice to prevent the interest of *B.* passing to his assignees on his bankruptcy, as property in his order and disposition.<sup>f</sup>

6.—*Possession in autre droit.*] Property which the bankrupt has in his possession as trustee, executor, or administrator, or factor, does not pass to his assignees.

As the object of the assignment of the bankrupt's property

<sup>a</sup> *Dean v. James*, 1 N. & Man. 393. 4 B. & Ad. 546. (24 Eng. C. L. 114). *Buck v. Lee*, 3 N. & M. 580. (28 Eng. C. L. 220.) *Ex parte Munro*, 1 Buck. 300. *Ex parte Burton*, 1 Glyn. & J. 207. *Ex parte Osborne*, *id.* 358.

<sup>b</sup> 1 N. & M. 393. 3 *id.* 580, *supra.* 1 Ad. & Ell. 808.

<sup>c</sup> *Ex parte Masterman*, 2 Mont. & Ayr. 209.

<sup>d</sup> *Ex parte Carbis*, 4 Dea. & Ch. 354. <sup>e</sup> *Ex parte Stright*, 2 Dea. & Chit. 314.

<sup>f</sup> *Smith v. Smith*, 2 C. & M. 231. 4 Tyr. 52.

is, that it may be applied to the payment of his debts, it is clear, that nothing passes by it which the bankrupt then holds in trust for others, or in which he has only a mere legal interest; but if at the time of the act of bankruptcy, the bankrupt possesses a possibility of interest, from which a benefit to his creditors might result, if he had the legal interest in any property, and it was uncertain whether he would hold any part of that property, (or if any, what part, as a trustee for others,) the whole would pass by the assignment; it would not remain in the bankrupt, subject to be transferred on a future contingency, and if it did pass to the assignees it could not be divested out of them, by the happening of events subsequent to the act of bankruptcy, which would make them hold the whole or part as trustees merely; for there is no provision in the statute which takes a right out of the assignees that has once been vested in them.<sup>a</sup>

Property which the bankrupt has in his possession as trustee, does not pass to the assignees.

Where the shares of an insurance company are held in the name of a bankrupt as trustee, they are not in his reputed ownership,<sup>b</sup> though he be the apparent owner, and the declaration of trust be secret.<sup>c</sup>

Where a trader assigned a chose in action for a valuable consideration and afterwards became a bankrupt; held, that he might sue the debtor in his own name for the benefit of the person to whom he assigned it; for after the assignment, he was but a \*mere trustee for the assignee, and such things as the bankrupt held as trustee did not pass under the commission.<sup>d</sup> Where *A.*, a trader, bought South Sea stock for *B.* in his own name, but entered it in his book as bought for *B.*, after which he became a bankrupt; held, that *B.* was entitled to the stock.<sup>e</sup> So where the Duke of Marlborough, as owner of an estate, had the use of furniture, which was settled in trustees in trust to permit the owner of the estate to use it; held, that the duke having become a bankrupt, the furniture did not pass to his assignees, for the duke had only a limited use of them; the trustees were the real owners, but they did not permit him to have the order and disposition of the goods.<sup>f</sup>

\*260

The commissioners of bankrupt cannot seize a testator's goods in the hands of an executor bankrupt, because they are not *his* goods; he is only the distributor and disposer of them for the benefit of creditors and legatees of the testator.<sup>g</sup> Where a trader married a woman who was in possession of goods as administratrix, and afterwards became bankrupt; held, that these goods did not pass to his assignees, for the administra-

Executor.

<sup>a</sup> Per Littledale, J., in *Carvalho v. Burn*, 4 B. & Ad. 393. (24 Eng. C. L. 85.)

<sup>b</sup> *Ex parte Watkins*, 1 Mont. & Ayr. 689.

<sup>c</sup> *Ex parte Watkins*, 2 Mont. & Ayr. 349. 4 Dea. & Ch. 47.

<sup>d</sup> *Winch v. Keely*, 1 T. R. 619. *Carpenter v. Marnell*, 3 B. & P. 40. S. P.

<sup>e</sup> Per Lord Parker, C., *ex parte Chion*, 3 P. Wms. 187. 2 Stark. Ev. 111.

<sup>f</sup> *The Earl of Shaftesbury v. Russell*, 1 B. & C. 666. (8 Eng. C. L. 178.)

<sup>g</sup> Per Grose, J., in *Farr v. Newman*, 4 T. R. 629.

trix had them in autre droit, and her husband could not have them in a better right, and the statute applied to such goods only as the bankrupt had in *his own* right.<sup>a</sup>

If an executor becomes a bankrupt, the commissioners cannot seize the specific effects of the testator; not even in money, which specifically can be distinguished and ascertained to belong to such testator, and not to the bankrupt himself.<sup>b</sup>

\*261  
Factor.

\*The statute does not extend to the case of factors or goldsmiths, who have the possession of other men's goods merely as trustees, or under a bare authority to sell for the use of the principal; but the goods must be such as the party suffers the trader to sell as his *own*.<sup>c</sup> But if the factor sells the goods and receives payment, and then becomes a bankrupt, the owner must come in under the commission.<sup>d</sup> Yet, if the goods remain in specie in the factor's hands, or if he sells them to be paid for at a future day, and he becomes bankrupt before payment, the owner or consignor may recover the full amount from the assignees.<sup>e</sup> So, if having received money in payment of the goods, he laid it out in other goods, such goods will not be subject to the bankruptcy, but will be the property of the consignor.<sup>f</sup>

Broker.

Where a broker was commissioned to buy exchequer bills, and received money for that purpose from his principal, but instead of doing so, he purchased American stock and bullion, with which he was about to abscond to America when he was apprehended, whereupon he gave up the stock and bullion to his principal; held, that the assignees of the broker who became a bankrupt on the day on which he purchased the American stock, &c., were not entitled to recover the proceeds from the principal. Lord Ellenborough, C. J., said, that the assignees were not entitled to recover if the defendant had succeeded in maintaining these propositions in point of law, viz., that the property of a principal entrusted by him to his factor, for any special purpose, belongs to the principal, notwithstanding any change which that property may have undergone in point of form, so long as such property is capable of being identified and distinguished from all other property; and secondly, that all property thus circumstanced, is equally recoverable from the assignees of the factor in the event of his becoming a bank-

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<sup>a</sup> *Ex parte Ellis*, 1 Atk. 101. But where a person entitled to take out administration neglected to do so, but remained in possession of the goods of the intestate, and became a bankrupt, and a creditor of the intestate afterwards took out administration, and claimed the goods from the assignees; held, that this was within the statute; as they had been for twelve years in the possession of the bankrupt, with the consent of all who were entitled to dispute it with him, that was sufficient. *Fox v. Fisher*, 3 B. & A. 135. (5 Eng. C. L. 243.)

<sup>b</sup> Per Lord Mansfield, C. J., in *Howard v. Jemmet*, 3 Burr. 1369. See also *Viner v. Cadell*, 3 Esp. 88.

<sup>c</sup> Per Lord Mansfield, C. J., in *Mace v. Cadell*, Cowp. 233.

<sup>d</sup> B. N. P. 43. *Scott v. Surman*, Willes, 400.

<sup>e</sup> *Id.*

<sup>f</sup> *Whitecomb v. Jacob*, 1 Salk. 160.

rupt, as it was from the factor himself before his bankruptcy. And upon a view of the authorities, it should seem, that if the \*property in its original state and form was covered with a trust in favor of the principal, no change of that state and form can divest it of that trust, or give the factor or those who represent him in right, any other more valid claim in respect to it than they respectively had before such change. An abuse of trust can confer no right on the party abusing it, nor on those who claim in privity with him.<sup>a</sup> \*262

If goods be sent to a factor to be disposed of, who afterwards becomes bankrupt, and the goods remain distinguishable from the general mass of his property, the principal may recover the goods in specie; nay, if they be sold and reduced to money, provided the money be in separate bags, and distinguishable from the factor's other property, the law is the same.<sup>b</sup>

7.—*Possession for a specific purpose.*] Where a bankrupt is in possession of the goods of another *bond fide* with the consent of the owner, at the time of the bankruptcy, for a specific purpose, beyond which he has not the right of disposition or alteration, that is not such a possession as will vest them in his assignees. Property in the possession of a bankrupt for a specific purpose, does not pass to the assignees.

As where it was agreed between *A.* and *B.*, that *B.* should contract with the commissioners of the Victualling Office to do certain work in his own name, that he was to have one-fourth of the clear profits, and a guinea a-week for his superintendence, and that *A.* should supply the timber for the purpose, and have the rest of the profits. The contract having been made with the commissioners, *A.* supplied the timber, which was received by the king's officers in the yard where the work was to be done. *A.* was one of *B.*'s sureties, which, according to the practice as to government contracts, would not have been allowed, had it been known that he was concerned in the contract. *B.* became a bankrupt, and *A.* took possession of the timber; held, that the assignees of *B.* were not entitled to recover the amount from *A.*, as there never was any sale of the timber to *B.*, nor any general delivery, so as to give him the \*absolute disposition of it: for it appeared in evidence that the storekeepers would not have permitted *B.* to have sold the timber to any other person, as they considered that it was delivered only for the purpose of the contract. There could be no danger that *B.*'s creditors would be induced to trust him on the credit of that property. The possession which he had was similar to that of a carpenter who receives timber to convert it to a wagon, or of a tailor to whom it is sent for the purpose of being worked up.<sup>c</sup> \*263

<sup>a</sup> Taylor v. Plumer, 3 M. & S. 562.      <sup>b</sup> Per Lord Kenyon, 4 T. R. 227.

<sup>c</sup> Collins v. Forbes, 3 T. R. 316. "With regard to the case of Collins v. Forbes; I was by no means satisfied with the decision; it struck me that when the timber was delivered to the officers of the government in the bankrupt's name and for his use, he



So, where a certificated bankrupt traded again, and was allowed by the assignees to remain for several years in possession of his house and furniture, in order to assist in settling the affairs of the bankrupt estate, the assignees repeatedly stating the furniture in their accounts with the creditors; held, that the furniture was not in the disposition of the bankrupt so as to sell them, and, therefore, that it did not pass to the assignees under a second commission. The bankrupt was not the reputed owner. The statute did not extend to every case of possession—not for instance to the case of a ready-furnished lodging; for possession of furniture in a house was no more evidence of a right to that furniture, than of a right to the house.<sup>a</sup>

Where a person having agreed to lend a trader a sum of money, to be applied to *a specific purpose*, gave him a check for that sum; the trader having committed an act of bankruptcy before he presented the check for payment, returned it to the lender not having made use of it; held, that the assignees of the trader could not maintain trover for it, for the bankrupt himself could not do so, and his assignees must in this respect stand in the same situation.<sup>b</sup>

\*264  
Possession of bills for a specific purpose.

\* “If goods or bills are deposited for a specific object, and the bailee will not perform the object, he must return them; the property of the bailor is not divested or transferred until the object is performed.”<sup>c</sup> So, if bills of exchange are remitted to a banker in London, with permission to discount them for a particular purpose, he has no right to discount them without executing the trust reposed in him; therefore, where bills were so remitted, and not discounted before the bankruptcy of the banker, they were ordered to be delivered up.<sup>d</sup> A customer paying bills not due into his banker’s in the country, who entered them as cash, (whether indorsed by the customer or not,) for the purpose of obtaining payment for them when due, is entitled to recover back such bills in specie from the banker after his bankruptcy, if his account be not overdrawn at the time of the bankruptcy.<sup>e</sup>

Every man who pays bills not due into the hands of his banker, places them there as in the hands of his agent, to obtain payment of them when due. If the banker discounts the

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had the possession, and order, and disposition of it. But the court proceeded on this ground, that he had possession of the goods for a *special purpose* only, and had not the order and disposition of them.” Per Lawrence, J., in *Gordon v. The East India Company*, 7 T. R. 237. If money received by an overseer of the poor, as such, be kept apart from his general property, his assignees upon his bankruptcy cannot claim it. *R. v. Eggington*, 1 T. R. 370.

<sup>a</sup> *Wallen v. Burnell*, Doug. 317.

<sup>b</sup> *Moore v. Barthrop*, 1 B. & C. 5. (8 Eng. C. L. 5.) *Ex parte Aiken*, 2 Madd. 192.

<sup>c</sup> Per Lord Tenterden, in *Buchanan v. Findlay*, 9 B. & C. 749. (17 Eng. C. L. 490.)

<sup>d</sup> *Ex parte Froud*, Mon. & M’A. 262. *Ante*, 216.

<sup>e</sup> *Giles v. Perkins*, 9 East, 12.

bill or advances money upon the credit of it, that alters the case; he then acquires the entire property in it; or has a lien on it *pro tanto* for his advance.<sup>a</sup> But if indorsed bills are deposited with a banker, and they are by him negotiated to a third person, though the purpose for which they were deposited be ever so cruelly disappointed by his becoming bankrupt, the original owner can have no claim to recover them in trover against such third person.<sup>b</sup> Where a customer was in the habit of paying into his banker's hands bills not due, which if approved were immediately entered (as bills) to his credit to the full amount, and he was then at liberty to draw for that amount by check upon the banker, he was charged interest on all money paid for him, and allowed interest on the amount of the cash paid in by him, and of the bills lodged by him from the time the amount of them was received, and the bankers paid away these \*bills to their customers as they thought fit; held, that such of the bills as remained as specie in the hands of the bankers, at the time of their bankruptcy were the property of the customers, the cash balance independently of such bills being in his favor, for in order to change the property the bankers must have bought or discounted the bills;<sup>c</sup> and it makes no difference whether the bills be entered by the bankers as cash or as bills.<sup>d</sup> But if it be manifest from the habits of dealing between the customer and his bankers, that they treated such bills as cash, they will pass to the assignees of the bankers, even though they be "entered short," that is, lodged with them for the purpose of collection merely.<sup>e</sup>

\*265

So, if there be an exchange of securities, as where a person Exchange having three bills of exchange, applied to a country banker, of securi- with whom he had no previous dealings, to give for them a ties. bill on London of the same amount, and the bill given by the banker was afterwards dishonored; held, that the banker having become bankrupt, the three bills were vested in his assignees as goods and chattels in the order and disposition of the bankrupt.<sup>f</sup> So, where bills are sent from one trader to another on a general running account.<sup>g</sup> But where *A.* placed long bills in the hands of *B.*, on condition of being allowed to draw shorter bills on him, and *B.* having accepted *A.*'s bills became a bankrupt, in consequence of which his acceptances were dishonored; held, that *A.* might recover back his long bills, for this was not an exchange of bills, but the long bills were placed in the hands of the bankrupt to answer a *particular purpose*, and that purpose not having been answered, the owner was

<sup>a</sup> Per Lord Ellenborough, C. J., *id.*

<sup>b</sup> Per Eyre, C. J., in *Bolton v. Puller*, 1 B. & P. 546.

<sup>c</sup> *Thompson v. Giles*, 2 B. & C. 422. (9 Eng. C. L. 127.) If sent for the purpose of being discounted, they pass to the assignees. *Carstairs v. Bates*, 3 Campb. 301.

<sup>d</sup> *Id.* *Giles v. Perkins*, *supra*. *Ex parte Benson*, Mon. & B. 120.

<sup>e</sup> *Ex parte Thompson*, Mon. & M'A. 102. *Ex parte Sargeant*, 1 Rose, 153.

<sup>f</sup> *Hornblower v. Proud*, 3 B. & A. 327.

<sup>g</sup> *Bent v. Puller*, 5 T. R. 494. *Ex parte Pease*, 19 Ves. 49.

entitled to recover them back, as having an ear mark on them which distinguished them from the mass of the bankrupt's property, and remaining in specie in his possession at the time of the bankruptcy.\*

\*266 \*As the preceding case was derived on the authority of *Tooke v. Hollingworth*,<sup>b</sup> it may not be improper to introduce the latter case in this place, though it does not strictly come under this head. An agreement was entered into between *A.* and *B.*, that *B.* should purchase of *A.* all the light gold coin which he could send him at a stated price, and that *A.* should from time to time draw upon him for the amount, and that *B.* should also occasionally accept bills drawn by *A.* for his own convenience, for which *A.* was to remit value. *B.* having become bankrupt, and being under acceptances to a large amount, and *A.* not knowing of the bankruptcy, sent a quantity of light gold and bills to enable *B.* to meet the acceptances, which parcel was taken to *B.*'s assignees; held, that *A.* having afterwards paid *B.*'s acceptances, might recover back the gold and bills on the ground that they were sent for the particular purpose of paying those acceptances, and as that purpose was not answered, the property in the gold and bills revested in *A.*<sup>c</sup>

Where *A.* being in prison received money from *B.* for the purpose of settling with his creditors; the purpose having failed, *A.* remitted part of the money to *B.*, and became a bankrupt by lying two months in prison; held, that as the money was advanced for a special purpose, the assignees could not recover back the money from *B.*<sup>d</sup>

If a son has goods in his possession as the servant of his father, and for the purpose of carrying on a trade for the sole benefit of the latter, they will not pass to the son's assignees.<sup>e</sup>

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## \*SECTION V.

## PROTECTED TRANSACTIONS.

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Convey- 1.—*Dealings with the bankrupt two months before the*  
ances,con- *fiat is issued.*] By 6 Geo. IV, c. 16, s. 81, it is enacted, that

\* *Parke v. Eliason*, 1 East, 546.

<sup>b</sup> 5 T. R. 215.

\* *Took v. Hollingworth*, 5 T. R. 215. See also *Bent v. Puller*, *id.* 494.

<sup>c</sup> *Toovey v. Milne*, 2 B. & A. 683.

<sup>e</sup> *Stafford v. Clark*, 1 C. & P. 24.

all conveyances by, and all contracts and other dealings and transactions by and with any bankrupt, *bond fide* made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, *bond fide* executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution and attachment shall have issued, had not at the time of such conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided, also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission, within two calendar months next after it shall have been superseded, no such conveyance, contract, dealing or transaction, execution or attachment, shall be valid, unless made, or entered into, executed or levied more than two calendar months before issuing the first commission.

Where the computation of time is to be from an act done, the day on which such act is done is to be included; and therefore, it has been held, that where a conveyance was executed on the 18th of February and the commission issued on the 18th of April, the two months were completed on the 17th of April, and any fraction of the 18th of April was sufficient to bring the case within the protection of the above enactment.<sup>a</sup> So where a *fi. fa.* was sued out on a judgment entered up under a warrant of attorney, and the sheriff seized the goods before ten in the forenoon of the 13th of August, and sold the same ten days afterwards; on the 13th of October following, about noon, a commission of bankrupt issued against the defendant; held, that the seizure and execution of the goods were valid, as more than two calendar months had elapsed before the execution and issuing of the commission.<sup>b</sup> Where a bill of exchange was delivered by a bankrupt, with the intent of transferring the property in it to *A.*, more than two months before the commission, but the indorsement was not in effect written upon it till within the two months; held, that the writing of the indorsement had reference to the delivery of the bill, that the case was clearly within the statute,

Computa-  
tion of  
time.

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<sup>a</sup> *Ex parte Farquhar*, 1 Mon. & M'A. 7. *Cowie v Harris*, M. & M. 141. (22 Eng. C. L. 270.) "The 81st section only applies where there has been a prior act of bankruptcy." Per Bayley, J., in *Wymer v. Kemble*, 6 B. & C. 482. (13 Eng. C. L. 238.)

<sup>b</sup> *Godson v. Sanctuary*, 4 B. & Ad. 255. (24 Eng. C. L. 53.) 1 Nev. & M. 52. The court here said that as soon as the sheriff seizes the goods, the execution is executed or levied, within the meaning of the above section; such being the construction put on the words "served and executed," in the 21 Jac. I, c. 19, s. 9.

and that the indorsee was entitled to recover on it.<sup>a</sup> It has been held, that payments made *bond fide* to a trader two months before a commission is taken out against him, is within the protection of this clause, payments being included in the term "dealings."<sup>b</sup>

Payments made by and to a bankrupt without notice, &c., to be valid, notwithstanding an act of bankruptcy.

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Persons not to be endangered for delivery of goods without notice.

*Bond fide* purchases of bankrupts not to be impeached.

Transactions not protected.

2.—*Dealings after an act of bankruptcy.*] By 6 Geo. IV, c. 16, s. 82, it is enacted that all payments really and *bond fide* made, or which shall hereafter be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt, (such payment not being a fraudulent preference of such creditor,) shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and *bond fide* made, or which \*shall hereafter be made to any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed.

By s. 84, it is enacted, that no person or body corporate, or public company, having in his or their possession or custody any money, goods, wares, merchandises, or effects belonging to any bankrupt, shall be endangered by reason of the payment or delivery thereof to the bankrupt or his order; provided such person or company had not, at the time of such delivery or payment, notice that such bankrupt had committed an act of bankruptcy.

By s. 86, it is enacted, that no purchase from any bankrupt *bond fide* and for valuable consideration where the purchaser had notice at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless the commission against such bankrupt shall have been sued out within twelve calendar months after such act of bankruptcy.

Where the bankrupt under a threat of arrest, delivered goods to a creditor in payment of a bill of exchange then overdue; held not to be a payment within the meaning of section 82, and consequently not protected.<sup>c</sup> Where, after a secret act of bankruptcy by *A.*, a trader, *B.* accepted an accommodation bill for him; subsequently, but on the same day, *A.* sold to *B.* four horses and delivered them to him as a security for the bill. *B.* paid the bill when it became due; *A.* having become a bankrupt, the court held that the transaction was not protected

<sup>a</sup> *Anon.* 1 Campb. 491.

<sup>b</sup> *Tucker v. Barrow*, M. & M. 137. 3 C. & P. 85 (14 Eng. C. L. 219.)

<sup>c</sup> *Smith v. Moon*, M. & M. 458. (22 Eng. C. L. 356.)

by this section. It was not a payment by the bankrupt within the meaning of the act, for the acceptance was given without any reference to the sale of the horses; and the agreement respecting \*the latter was merely to set off the price against the liability of the bankrupt on the bill; it was therefore not a payment by the bankrupt.\* \*270

If the payment of a bill be made after an act of bankruptcy the burden of showing that it is a *bond fide* payment is cast upon the receiver. Therefore, where a trader after a secret act of bankruptcy concealed himself from his general creditors and gave to a creditor, who was acquainted with the place of his retreat, a bill of exchange for part of his debt; held, that it was not a payment protected by the 82d section.<sup>b</sup> Payment of a bill after an act of bankruptcy.

But where *A.* after a secret act of bankruptcy bought goods of *B.*, to be paid for at a future day. On that day *A.* delivered to *C.* undue bills for the amount, requesting *C.* to pay *B.*; *C.* discounted the bills, and paid *B.* by a check on his bankers. Held, that this payment was protected by s. 82, against the assignees under a commission issued subsequently to such payment on the antecedent act of bankruptcy.<sup>c</sup> So where *A.*, after the bankruptcy of his partner, believing the firm to be solvent, paid in partnership money to *C.*, their banker, to meet current engagements, and the money was so applied. *A.* afterwards became bankrupt also. Held, that this payment was valid, and that *C.* was not liable for the amount to the assignees of *B.* and of *A.*<sup>d</sup>

A delivery of *goods bond fide* by a trader in discharge of a debt, is within sec. 82 of the bankrupt act, 6 Geo. IV, c. 16, if it be intended as a payment, so that in point of law it can be pleaded as such.<sup>e</sup>

3.—*Payments to the bankrupt, &c.*] The 82d section protects not only payments made in respect of debts due to the bankrupt, but also payments made in respect of *bond fide* sales of goods, so far, at least, as to enable the purchaser to retain the goods until the sum paid be restored to him.

Where *A.* purchased of *B.*, a hop-merchant, a library, and paid him; *B.* had previously committed an act of bankruptcy of which *A.* was then ignorant, and a commission was sued out against him within two months of the transaction; held, that the assignees of *B.* were not entitled to the books, without at \*least tendering the price of them. Lord Tenterden, C. J., observed, “the statute declares that the payment shall be deemed valid; but if, notwithstanding the payment to the Goods purchased of the bankrupt. \*271

<sup>a</sup> *Carter v. Breton*, 6 Bing. 617. (19 Eng. C. L. 180.) 4 M. & P. 424.

<sup>b</sup> *Bagnall v. Andrews*, 7 Bing. 217. (20 Eng. C. L. 107.) 4 M. & P. 839.

<sup>c</sup> *Shaw v. Batley*, 1 Nev. & M. 751. 4 B. & Ad. 801. (24 Eng. C. L. 168.)

<sup>d</sup> *Woodbridge v. Swann*, 1 Nev. & M. 725. 4 B. & Ad. 633. (24 Eng. C. L. 130.)

<sup>e</sup> *Cannan v. Wood*, 1 Mur. & Hur. 77. 2 Mees. & Wels. 465.



bankrupt, the assignees can recover back the goods, without offering to return the money, the payment will not be valid for any beneficial purpose to the party paying; and the only mode therefore in which effect can be given to the words of this section is to hold, that the party paying shall retain the goods so long at least as he is kept out of his money.<sup>a</sup> So, where a party gave cash for a bank post bill to the bankrupt after a secret act of bankruptcy, it was held to be within the purview of this section.<sup>b</sup>

Assigning  
chattels as  
a security.

A trader, having committed a secret act of bankruptcy, assigned chattels to a creditor as a security for money lent him, in trust to permit the trader to use them until March, 1833, and then to sell them in discharge of the debt if unpaid. Within two months after this assignment a fiat issued; held, that this assignment was not within the protection of the eighty-second section.<sup>c</sup> Where the creditors of a bankrupt after a secret act of bankruptcy pressed for payment, and the bankrupt offered to sell goods to pay them, if a customer could be found, upon which the creditors produced the defendant, to whom they were indebted, and he took the goods in payment of such debts the creditors giving to the bankrupt a receipt as for so much money paid to them; it was held, that if the appropriation of the purchase money to the use of the creditors was irrevocable by the bankrupt the payment was good, but otherwise if it might have been revoked by him.<sup>d</sup>

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\*Where a bankrupt, after a secret act of bankruptcy, bought on credit, and sold for ready money, at unusually low prices; it was held, that unless the purchase was in the usual course of business; and if the purchaser knew that the price was greatly under the value of the commodity, it could not be deemed a *bonâ fide* sale, and was not within the protection of the statute.<sup>e</sup>

A pay-  
ment for  
goods  
fraudu-  
lently sold  
by a bank-  
rupt, be-

*A.* and *B.*, who were traders in embarrassed circumstances, directed one of their shopmen to remove large quantities of goods to his lodgings, and to sell them at 25 per cent. under prime cost. The shopman called on the defendants and offered the goods for sale without disclosing the names of his employers, but stating that the owners were in want of money; the

<sup>a</sup> *Hill v. Farnell*, 9 B. & C. 45. (17 Eng. C. L. 330.) *Cash v. Young*, 2 B. & C. 413, (9 Eng. C. L. 127,) S. P. *Coles v. Robinson*, 3 Campb. 183. Under the old statutes, Lord Tenterden decided, that payments only, and not sales, were protected; *Saunderson v. Gregg*, 3 Stark. 72. (14 Eng. C. L. 165.) But in *Hill v. Farnell*, 9 B. & C. 51, (17 Eng. C. L. 330,) his lordship seems to doubt the validity of that decision, for he says it was acquiesced in, probably without agreement, and probably also, from a doubt that the transaction was *bonâ fide*. See *Bishop v. Crawshaw*, 3 B. & C. 415; (10 Eng. C. L. 136;) where under the old statutes it was held, that the payment must be of an antecedent debt; but the provisions of the statutes were different.

<sup>b</sup> *Willis v. The Bank of England*, 1 H. & W. 620. 5 N. & M. 478.

<sup>c</sup> *Cannan v. Denew*, 10 Bing. 292. (25 Eng. C. L. 139.) 2 M. & Scott, 761.

<sup>d</sup> *Bradbury v. Anderton*, 1 C. M. & R. 486.

<sup>e</sup> *Warde v. Clarke*, M. & M. 497. (22 Eng. C. L. 369.)

defendant called at the lodgings and made several large purchases, paying the shopman for each parcel in cash and deducting the discount; a fiat in bankruptcy issued, and the assignees brought trover to recover these goods; the jury found that the bankrupts intended to defraud their creditors, and that the defendants had not made such inquiries as honest and prudent men would have done; held, that the assignees of the bankrupts were entitled to recover back the goods sold both before and after the commission of the act of bankruptcy, for as the payments for the goods were not made *bond fide*, the transaction was not protected by sec. 82.<sup>a</sup>

fore his bankruptcy, is not protected if the vendee had means of knowing under what circumstances they were sold.

4.—*Partnership payments.*] *A.*, after the bankruptcy of his partner *B.*, believing the firm to be solvent, pays in partnership money to *C.*, their banker, to meet current engagements, and the money is so applied. *A.* afterwards becomes bankrupt also. This payment is valid.<sup>b</sup>

Payments made on account of the partnership after one of the partners has committed an act of bankruptcy.

Where one partner after an act of bankruptcy committed by him paid a partnership debt, to a creditor who was aware of the act of bankruptcy; a joint commission having been subsequently issued against both the partners; held, that the payment was not protected, though only one of the partners had committed an act of bankruptcy when it was made.<sup>c</sup>

One of two partners after committing an act of bankruptcy handed over a bank post bill and some silver to the agent of the drawer of a bill of exchange accepted by the partners, and which was just about to become due, for the purpose of protecting such bill. Such handing over was found a fraudulent preference, and to have been in contemplation of bankruptcy. On the same day, but a few hours later than the time of handing over the note and the money, the other partner committed an act of bankruptcy; held, that the act of the partner who had committed the act of bankruptcy before he handed over the property was not binding, and that the assignees of the two partners might recover the value of the property.<sup>d</sup>

One of two partners on the 4th of January, committed a secret act of bankruptcy. On the 5th of January the other partner accepted bills in the name of the partnership firm, in favor of one of the creditors of the partnership, all of which bills were ante-dated before the 4th of January. These bills were afterwards indorsed for a valuable consideration to *R.*, who had no notice of the bankruptcy. On the 10th of January a joint commission issued against both partners; held, that the holder of the bills could not prove them against the joint estate, as the solvent partner could not bind the joint property by accepting bills after the act of bankruptcy of his co-partner.<sup>e</sup>

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<sup>a</sup> *Devas v. Venables*, 3 Hodges, 9. 3 Bing. N. C. 400.

<sup>b</sup> *Woodbridge v. Swann*, 1 Nev. & M. 725. 4 B. & Adol. 633. (24 Eng. C. L. 130.)

<sup>c</sup> *Craven v. Edmonds*, 6 Bing. 734. (19 Eng. C. L. 219.) 4 Moore & P. 622.

<sup>d</sup> *Burt v. Moulton*, 1 C. & M. 525. 3 Tyr. 564.

<sup>e</sup> *Ex parte Wynn Ellis*, 2 Deac. & Chitt. 555.

The act of bankruptcy must be one which will support the fiat.

It may be observed, that an act of bankruptcy which will enable the assignees to invalidate the transaction sought to be impeached, to recover payments made by the bankrupt, must be one which would support the fiat under which they claim: and consequently must have been committed subsequently to the date of the petitioning creditor's debt;<sup>a</sup> and it must also be an act of which the petitioning creditor can avail himself. Therefore, where the act of bankruptcy upon which the assignees relied, consisted of a fraudulent conveyance by the bankrupt, to which the petitioning creditor was a party, it was held, that they could not avail themselves of it in support of their claim.<sup>b</sup>

5.—*Fraudulent preference.*] It is clearly settled, that in order to invalidate a payment or transfer of property to a creditor, on the grounds of fraudulent preference, the transaction must not only be in contemplation of bankruptcy, but it must also be *voluntary*.

Any pressure by the creditor precludes a fraudulent preference

If a trader makes an assignment or transfer of his effects upon the importunity of his creditor, or through the urgency of the demand, or under the apprehension of a prosecution, or of a legal process, however groundless such apprehension may be, whatever may have been in the contemplation of the trader, it will not vitiate the transaction, as it cannot be deemed a voluntary act.<sup>c</sup> "It is immaterial," said Lord Ellenborough, "whether the trader had or had not an act of bankruptcy in contemplation at the time, if the creditor pressed for payment or security, and thereby obtained such payment or security."<sup>d</sup>

\*274 A security given on the importunity of the creditor, even for a debt not due, is not a fraudulent preference

\*Where *A.*, a bookseller, procured *B.*, a pawnbroker, to discount some accommodation bills for him, and *B.* having subsequently required some collateral security for the payment thereof, *A.* secretly deposited with him several parcels of books for the purpose of being sold, to reimburse him in case the bills should not be paid; about three months afterwards, *A.* became a bankrupt, the bills then remaining in *B.*'s hands unsatisfied. In an action of trover by the assignees for the books, on the grounds that they were given to *B.* by way of undue preference, Lord Ellenborough nonsuited the plaintiffs, observing that it was not a voluntary preference. The bankrupt parted with the books upon the defendant's importunity, who had a right to ask for further security though the bills were not due. The consideration upon which payment made to an importunate creditor of a debt actually due has been allowed to be valid, has not been that he might resort to a suit to enforce payment, but that his demand repels the presumption that the

<sup>a</sup> *Id.* *Ex parte Birkett*, 2 Rose, 71.

<sup>b</sup> *Burbridge v. Watson*, 4 C. & P. 170. (19 Eng. C. L. 326.)

<sup>c</sup> *Hartshorn v. Slodden*, 2 B. & P. 582. *Thompson v. Freeman*, 1 T. R. 155. See *ante*, 224 et seq.

<sup>d</sup> In *Crosby v. Crouch*, 11 East, 261.

bankrupt, upon the eve of bankruptcy, made a distinction among his creditors, and spontaneously favored one of them to the prejudice of the rest. A demand of further security for a debt not yet due has the same effect; and in neither case is there any fraud upon the bankrupt laws, on which ground alone transactions previous to bankruptcy can be set aside; where the urgency is *bonâ fide*, it excludes the security from being a voluntary one. The receiving of goods removed under circumstances of secrecy, has been treated in argument as fraudulent; but if a creditor were entitled to demand, and demanding, to receive a security in goods for a running debt, I want to know upon what principle he was obliged to insist upon the transaction being conducted by his debtor, with any particular circumstances of publicity, and which might be in other respects injurious to the general credit of such debtor.<sup>a</sup>

A defendant who had been arrested and given bail to the sheriff became bankrupt, and the sheriff being fixed, a judge's order was made to stay proceedings on payment of the debt and costs, which were paid by the attorney of the bankrupt after the fiat had issued, who had previously to the date of the fiat <sup>a</sup>received it from the bankrupt; held, that the sum so paid could not be recovered by the assignees from the plaintiff in the former action; for it was money recovered by due course of law.<sup>b</sup>

Money received by course of law is not a fraudulent preference. \*275

Where a creditor, knowing his debtor (a bookseller) to be in embarrassed circumstances, represented to him that he did not like to leave the account unsettled, and desired to see what books he could have out of his shop, in order to cover his demand; but he did not ask for any money, as he knew he could not get it. The debtor selected such books as he could spare, without impeding the carrying on of his business, and gave them to the creditor. Held, not a voluntary preference, for the books were given in consequence of his being pressed by the creditor for that purpose, who was not disposed to trust him any longer. There is no occasion for a creditor under such circumstances to threaten an actual arrest.<sup>c</sup>

Goods given on being pressed.

*A.* discounts a bill for *B.*, and before it becomes due, has reason to suspect that the acceptance is forged. He takes two constables to an inn where *B.* is. Whilst they are in attendance below, he asks *B.*, whether he is aware there is any irregularity in the bill, *B.* says, "I am," but the whole shall be paid. *A.* insists upon payment before *B.* left the room: on which *B.* proposes to assign some hops, &c., lying in a rented warehouse. There was evidence that after the arrangement was acceded to, and before the bill of sale was executed, *B.* must have been aware the constables were in attendance, as messages were sent up from them to know whether they were

<sup>a</sup> Crosby v. Crouch, 11 East, 256. 2 Camp. 166.

<sup>b</sup> Belcher v. Mills, 1 Gale, 142. 2 C. M. & R. 150.

<sup>c</sup> Smith v. Payne, 6 T. R. 152.

wanted. The bill of sale was held good against a subsequent bankruptcy.<sup>a</sup> So where a trader gave a forged bill to *B.*, as a security for property, and *B.*, having discovered the forgery, demanded the property, which the trader immediately transferred to him. Lord Ellenborough said, that the question for the jury was whether the transfer was voluntary, or made under an apprehension that a degree of force, civil or criminal, was about to be applied; and that every thing which might overcome the free will of the party, was sufficient to exclude a voluntary preference.<sup>b</sup>

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Goods  
given on  
being  
pressed.

Where a trader, in contemplation of bankruptcy, and without solicitation, put three checks into the hands of his clerk, to be delivered to a creditor at his counting-house; but, before they were delivered the creditor called upon the trader, and demanded payment of his debt. The checks were afterwards paid to the creditor. Lord Ellenborough held, that this was not to be considered a voluntary payment. The intermediate demand took it out of the cases previously decided on this subject. There was an intention of giving a voluntary preference; but the intention not having been consummated, the payment was good.<sup>c</sup>

Giving a  
bill of sale  
of all his  
stock un-  
der pres-  
sure.

But where a trader, being pressed by a creditor for payment or security, one or other of which he said he would have, gave a bill of sale of apparently the whole of his stock; and immediately left his business, and became a bankrupt. Lord Ellenborough was disposed to consider it a voluntary preference; for the threat of the creditor, even if put into execution, could not put the bankrupt in a worse situation than the actual transfer of the goods did. He did not redeem himself from any present difficulty by doing the act; which is the motive for such an act when really done under the pressure of a threat; and as he got nothing by evading the threat, I should rather say, (observed his lordship,) that it was a voluntary act and preference on his part, as to the particular creditor.<sup>d</sup> So where the acceptor of a bill of exchange, two days before the expiration of the time for which the bill was originally drawn, privately informed the indorser that he was insolvent; the indorser insisted on being paid the amount of the bill, upon which the acceptor paid it,

Paying a  
bill of ex-  
change.

\*277

and in four days after became a bankrupt; it also appeared, that the bill had been altered so as to make it fall due before

<sup>a</sup> *Atkins v. Seward*, Man. Index, 62. Coram Holroyd, J., in Winchester spring assizes, 1819.

<sup>b</sup> *De Tastet v. Carroll*, 1 Stark. 88. (2 Eng. C. L. 308.)

<sup>c</sup> *Bailey v. Ballard*, 1 Campb. 416. The soundness of this decision was doubted by Park, J., in *Cook v. Rogers*, 7 Bing. 446; (20 Eng. C. L. 194;) where it was held that solicitation or a threat on the part of the creditor was not of itself sufficient to protect a payment, unless the jury were satisfied that the debtor was influenced by the threat in making such payment. But the doctrine here laid down may be considered as overruled by more recent cases. See *Morgan v. Brundrett*; *Atkinson v. Brindle*; and other cases, *ante*, 229.

<sup>d</sup> *Thornton v. Hargraves*, 7 East, 544.



this transaction, but without the knowledge of the indorser; held, that this was sufficient proof of a fraudulent preference, so as to entitle the assignees to recover the amount of the bill from the indorser. Lord Eldon said, that the circumstance of the bankrupt calling on the defendant two days before the bill became due, afforded strong ground to infer fraud, and that the inference of fraud, as far as related to the bankrupt, was rather strengthened by the alteration which had taken place in the date and time of payment of the bill.<sup>a</sup>

The result of the modern authorities is, that to constitute a fraudulent preference within the meaning of this act, the transfer of property must not only be made in contemplation of bankruptcy, but it must also be *voluntary*, and with an intention to prefer a particular creditor to the injury of others. The slightest solicitation on the part of the creditor will protect the transaction; unless it clearly appears that the act originated with the debtor, and that he took the first step to make the transfer, it will not be deemed a fraudulent preference; and it is incumbent on the party who seeks to defeat the transaction to show that it was voluntary.<sup>b</sup>

Result of  
the autho-  
rities.

6.—*Notice.*] Having considered the transactions which will not be affected by a previous act of bankruptcy, provided the party dealing with the bankrupt had no knowledge of such act, it remains to be observed, that independently of the ordinary evidence of the parties having notice of an act of bankruptcy, it is enacted by the 6 Geo. IV, c. 16, s. 83, that the issuing of a commission shall be deemed notice of a prior act of bankruptcy (if an act of bankruptcy had been actually committed before the issuing of the commission) if the adjudication of the person or persons against whom such commission has issued \*shall have been notified in the London Gazette, and the person or persons to be affected by such notice may reasonably be presumed to have seen the same.

What  
shall be  
deemed  
sufficient  
notice of  
an act of  
bankrupt-  
cy.

\*278

And by section 85, if any accredited agent of any body corporate or public company shall have had notice of any act of bankruptcy, such body corporate or company shall be hereby deemed to have had such notice.

What  
shall be  
deemed  
notice to a  
body cor-  
porate.

It has been held, that a notice of an act of bankruptcy given to the Bank of England in London, in time for communication to be made to branch banks, is sufficient to bind the bank in respect of transactions with the bankrupt at any of the branch banks of that establishment; and that the assignees of a bankrupt may recover in trover from the Bank of England the amount of bank post bills changed by an agent of the bankrupt at a branch bank, after notice of the act of bankruptcy

<sup>a</sup> Singleton v. Butler, 2 Bos. & P. 283.

<sup>b</sup> See *ante*, 229. Morgan v. Brundrett, 5 B. & Ad. 239. (27 Eng. C. L. 79.) Atkinson v. Brindall, 2 Bing. N. C. 227. (29 Eng. C. L. 316.) Doe v. Gillett, 2 C. M. & R. 580. 1 Gale, 327.



given to the bank in London in sufficient time to have been communicated to the branch bank; for the general rule of law is, that notice to the principal, is notice to all his agents.<sup>a</sup>

**Creditors** 7.—*Judgments.*] The 6 Geo. IV, c. 16, s. 108, enacts, that  
 having se- no creditor having security for his debt, or having made any  
 curities for attachment in London, or any other place, by virtue of any  
 their debts custom there used, of the goods and chattels of the bankrupt,  
 not to re- shall receive upon any such security or attachment more than  
 ceive more a rateable part of such debt, except in respect of any execution  
 than other or extent served and levied, by seizure upon, or any mortgage  
 creditors. of or lien upon any part of the property of such bankrupt  
 before the bankruptcy; provided that no creditor, though for a  
 valuable consideration, who shall sue out execution upon any  
 judgment obtained by default, confession, or *nil dicit*, shall avail  
 himself of such execution to the prejudice of other fair credi-  
 tors, but shall be paid rateable with such creditors.

\*279 This enactment comprises every species of judgment ob-  
 tained \*against a defendant, except judgment after verdict, trial  
 by the record, and on demurrer.<sup>b</sup>

**A creditor** Where a creditor having entered up judgment, under a war-  
 may retain rant of attorney, issued a *fi. fa.*, and took from the sheriff a  
 payments bill of sale of the goods seized; the debtor having become a  
 made to bankrupt, and his assignees having taken possession of the  
 him by goods; it was held, that the creditor might recover them from  
 means of the assignees in an action of trover; for the seizure and sale  
 an execu- being complete before the bankruptcy, the creditor was not at  
 tion, be- the time of the bankruptcy, “a creditor having security,” with-  
 fore an act in the meaning of this section, as he had been paid by means  
 of bank- of the execution. Lord Tenterden, C. J: “The exception con-  
 ruptcy. tained in the clause applies to creditors having security, for a  
 person who has levied by seizure is such a creditor, he has a  
 security by his right to have the goods sold; then comes the  
 proviso, which only limits the exception, and the exception  
 only applies to cases falling within the first part of the section;  
 viz., those of creditors having security; the plaintiff in this case  
 was not at the time of the bankruptcy a creditor at all, for he  
 had been paid by means of the execution, and therefore could  
 not be within the operation of the statute.<sup>c</sup> So where the goods  
 of two joint traders were seized under a *fi. fa.*, returnable on  
 the 2d of May, and the traders paid to the sheriff the debt on  
 the 1st of May; one of them became a bankrupt on the 2d, and  
 the other on the 5th of May. On the 11th, a commission of  
 bankruptcy was issued, and on the 19th, the sheriff paid over

<sup>a</sup> Willis v. The Bank of England, H. & W. 620. 5 N. & M. 478. See *ante*, 275, as to another point. And see Mayhew v. Eames, 3 B. & C. 601. (10 Eng. C. L. 195.)

<sup>b</sup> Cuming v. Welsford, 6 Bing. 502. (19 Eng. C. L. 149.)

<sup>c</sup> Wymer v. Kemble, 6 B. & C. 479. (13 Eng. C. L. 238.) Higgins v. M'Adams, 3 Y. & J. 2. Morland v. Pellatt, 8 B. & C. 722. (15 Eng. C. L. 332.)

the money to the execution creditor. Held, that he was entitled to retain it, for the seizure of the goods, and the conversion of them into money extinguished the debt, and consequently the execution creditor was not "a creditor." But where a creditor obtained judgment by *nil dicit* against a trader, and therefore issued a *fi. fa.*, and the sheriff seized the trader's goods, who afterwards and before the sale committed an act of bankruptcy, upon which a commission was sued out, of which the sheriff had notice; but the sheriff nevertheless sold \*the goods, and paid the proceeds to the execution creditor; held, that the assignees might recover the sum so paid from the sheriff, in an action for money had and received. Lord Tenterden: "The judgment in this case, is within the very words of the proviso in the 108th section. The object of that enactment certainly was to prevent voluntary preferences; the words may probably go beyond the intention. The intention that the creditor under such circumstances shall not have the full benefit of his execution, but only be paid *pari passu* with other creditors is sufficiently manifest; and the only effectual mode of giving effect to that intention, is to prevent the creditor from receiving the money produced by the sale of the goods taken in execution. If the creditor is allowed to receive and retain the money, he will frequently receive more than a rateable proportion. The safe course therefore is, to say that he ought not to receive it; and consequently if he does receive it, he will be liable to an action for money had and received to the use of the assignees. It was the duty of the sheriff to have paid this money to the assignees,\* and having wrongfully paid it to the creditor, he is liable in an action for money had, at the suit of the assignees. The seizure being prior to the act of bankruptcy will be lawful and right; it is not necessary to say whether the sale be lawful or tortious; the sale may be lawful, and yet the proceeds may belong to the assignees; or if it be wrongful they may waive the wrong, and sue for the proceeds as money received to their use."<sup>b</sup>

To entitle the creditor to a preference, there must be a sale as well as a seizure before the act of bankruptcy.

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The provisions of the above section being considered to have an injurious tendency, by deterring plaintiffs from taking cognovits, whereby expenses might be saved; to remedy which it was enacted, by 1 W. IV, c. 7, s. 7, "that no judgment signed, or execution issued, after the passing of this act, on a cognovit actionem, signed after declaration filed or delivered, or judgment by default, confession or *nihil dicit*, according to the practice of the court, in any action commenced adversely, and not by collusion for the purpose of fraudulent preference, shall be \*deemed or taken to be within the said provision of the said act," (*i. e.* 6 G. IV, c. 16, s. 108.)

Cognovit not within sec. 108.

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\* But the court will not compel the sheriff, in a summary way, to pay the money under such circumstances to the assignees. *In re Washbourn*, 8 B. & C. 444. (15 Eng. C. L. 261.)

<sup>b</sup> *Notley v. Buck*, 8 B. & C. 160. (15 Eng. C. L. 178.)

Judgment  
on a war-  
rant of at-  
torney.

It has been decided that this enactment does not extend to judgments on warrants of attorney, though given without collusion or intention of fraudulent preference. Where the sheriff seized goods under a *fi. fa.*, issued on such a judgment, and after the seizure, but before sale, the debtor committed an act of bankruptcy, of which the sheriff had notice, notwithstanding which, he sold the goods, and paid the proceeds to the execution creditor; held, that he was liable to the assignees in an action for money had and received.<sup>a</sup>

Execu-  
tions exe-  
cuted two  
months  
before the  
fiat is sued  
out are  
protected  
by sec. 81.

The 108th section does not extend to executions executed two months before the commission is sued out, such executions being protected by section 81. Where the sheriff seized goods under an execution issued on a warrant of attorney two months before a commission was issued against the debtor; held, that it was protected by section 81, and not within section 108. Lord Denman, C. J.: "The words of section 108 are very large, so as to make it almost necessary to impose some limitation on their meaning. I think that the section does not so far control section 81, as to prevent its clear and distinct words from operating in a case of this description." Parke, J.: "It appears to me that section 81 applies to all executions levied more than two months before the issuing of the commission whether found on judgments after verdict, or on judgments by default or confession; and that the 108th section applies only to judgments by default or confession, or *nil dicit*, where the seizure has taken place within two calendar months before the issuing of the commission; this construction will reconcile the two sections of the act. The 108th section, though obscure in its terms originally, has received a judicial construction which makes it tolerably clear. The creditor who has issued execution on a judgment after verdict, though within two months, is entitled to a preference, if the seizure was before an act of bankruptcy; but where the judgment is by default or confession, then, to entitle the creditor to a preference, there must have been a sale as well as a seizure." Patteson, J.: "The 108th section does \*not in my judgment apply to any case protected by section 81. I believe the 108th has given occasion within a few years to more litigation than any section in any act of parliament ever did."<sup>b</sup>

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<sup>a</sup> *Crosfield v. Stanley*, 4 B. & Ad. 87. (24 Eng. C. L. 30.)

<sup>b</sup> *Godson v. Sanctuary*, 4 B. & Ad. 255. (24 Eng. C. L. 53.) 1 N. & M. 52.

SECTION VI.

ACTIONS BY ASSIGNEES.

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From what has been already stated, it appears that all the property of the bankrupt, real and personal, in possession remainder, reversion, or in action merely, to which he was entitled at the date of the act of bankruptcy, or afterwards, is vested absolutely in the assignees by virtue of their appointment, so as to give them the same rights and remedies with relation to it, as if the property vested in them in their own right individually. They, have, therefore, the same remedies by action for the recovery of debts due to the bankrupt, and for all civil injuries with respect to the property thus vested in them, that the bankrupt himself would have had, if no fiat had been sued out against him.<sup>a</sup>

1.—*Trover*.] This is the usual form of action when there is an asportation of goods. It lies against a sheriff for taking the bankrupt's goods in execution after an act of bankruptcy, and selling them after a commission is sued out; provided the \*commission be sued out within two months of the seizure.<sup>b</sup> \*283 So, if having seized them after an act of bankruptcy, he sells them even before a fiat is sued out, and without notice of the bankruptcy; for the property vests in the assignees by relation from the time of the act of bankruptcy, and the sheriff is bound to know whose goods he takes;<sup>c</sup> and it makes no difference that the sheriff has paid over the proceeds to the petitioning creditor upon an indemnity; he is still liable to the assignees in this form of action, though he had no notice of the act of bankruptcy.<sup>d</sup> So where the sheriff had seized the goods

When trover lies against a sheriff.

<sup>a</sup> "It is by no means true, as a general proposition, that the assignees can maintain no other actions than what might be maintained by the bankrupt. A bankrupt cannot recover the value of goods he had delivered, in pursuance of a purpose of fraudulent preference in contemplation of bankruptcy, which his assignees may, and in daily practice constantly do, and many other instances to the same effect may be cited." Per Lord Ellenborough, C. J., in *Bloxam v. Hubbard*, 5 East, 421.

<sup>b</sup> *Cooper v. Chitty*, 1 Burr. 20. 1 Bl. 65. *Smith v. Milles*, 1 T. R. 475.

<sup>c</sup> *Balme v. Hutton*, 9 Bing. 471. (24 Eng. C. L. 338.) 3 M. & Scott, 1. 1 C. & M. 262. *Dillon v. Langley*, 2 B. & Ad. 131. (22 Eng. C. L. 46.) *Carlisle v. Garland*, 7 Bing. 298. (20 Eng. C. L. 136.) 10 Bing. 452, (25 Eng. C. L. 192,) S. C. (Error.) 2 C. & M. 31, S. C. *Price v. Helyar*, 4 Bing. 604. (15 Eng. C. L. 87.) *Potter v. Starkie*, 4 M. & S. 260. In *Balme v. Hutton*, 2 Crom. & J. 19, the Court of Exchequer held that the sheriff was not, under such circumstances, liable in this form of action, but their decision was reversed by a court of error, *supra*.

<sup>d</sup> *Young v. Marshall*, 8 Bing. 43. (21 Eng. C. L. 215.) *Potter v. Starkie*, *supra*.

**Trover.** subsequent to an act of bankruptcy, and after having received notice thereof, he made a bill of sale to the execution creditor who sold them to another creditor, who afterwards became one of the assignees, and permitted part of the property to remain on the bankrupt's premises; held, that the sheriff was liable for the amount to the assignees in trover, though they might take the goods from the vendee, or ratify the sale, and recover the proceeds from the seller.<sup>a</sup>

**When trover lies against an execution creditor.** And so, if the execution creditor becomes a party to the tortious proceedings of the sheriff, by receiving the proceeds of the sale, or by accompanying the officer at the time of the execution, or by giving a bond to the sheriff, (because giving a bond is equal to intermeddling,) he is liable to the assignees in trover, and in such a case there is no occasion for an actual demand, because the property being vested in the assignees from the time of the bankruptcy, the execution was tortious.<sup>b</sup>

**Against other persons.** And in all cases where the goods of a trader are taken by a third person after an act of bankruptcy, the assignees may \*maintain trover to recover the value of them: as, where a relation of the bankrupt took plate out of the bankrupt's house and disposed of it for the maintenance of the bankrupt and his family, during his examination, at the request of the bankrupt; held, that the assignees might maintain trover for it against the relation.<sup>c</sup> So trover is the proper form to sue for the value of a bill of exchange indorsed by the bankrupt to a creditor, after an act of bankruptcy.<sup>d</sup> So for goods sold by the bankrupt after an act of bankruptcy.<sup>e</sup> Where the goods are in the order and disposition of the bankrupt at the time of the bankruptcy, there need not be an actual demand and refusal<sup>f</sup> before action brought, for the very taking of the goods from one who has no right to dispose of them is a conversion; but if the goods be received by the party before an act of bankruptcy, it seems that a demand and refusal must be proved to maintain an action in trover.

**When a demand and refusal must be shown.** Where the goods were collusively sold by a trader in contemplation of bankruptcy, and with a view to give the creditor a fraudulent preference; it was held necessary to show a demand and refusal, or an actual conversion, to sustain trover.<sup>g</sup> So, where a trader delivered bills of exchange to a creditor in contemplation of bankruptcy; held, that the receipt of the money for the bills by the creditor, was not a sufficient conversion, and that the assignees could not maintain trover

<sup>a</sup> *Vaughan v. Wilkins*, 1 B. & Ad. 370. (20 Eng. C. L. 400.)

<sup>b</sup> *Rush v. Baker*, 2 Stra. 996. B. N. P. 41. *Merham v. Edmonson*, 1 B. & P. 369.

<sup>c</sup> *Thompson v. Councell*, 1 T. R. 157.

<sup>d</sup> *Waller v. Drakeford*, 1 Stark. 481. (2 Eng. C. L. 476.)

<sup>e</sup> *Hurst v. Gwennap*, 2 Stark. 306. (3 Eng. C. L. 357.)

<sup>f</sup> *Soames v. Wats*, 1 C. & P. 400. (11 Eng. C. L. 436.)

<sup>g</sup> *Nixon v. Jenkins*, 2 H. Bl. 135.

without proving a demand and refusal before the bills became Trover due.<sup>a</sup>

If the assignees affirm the acts of a person who wrongfully sold the property of the bankrupt, they cannot afterwards treat him as a wrong doer and maintain trover. As, where a trader absconded and left his dwelling-house and shop, and the defendant took possession thereof, and carried on the business *bona fide* for the benefit of all the creditors of the bankrupt, and kept a daily account of his receipts, payments, &c.; after a commission had been sued out he was summoned before the commissioners, and he delivered a copy of the account so kept by him to the assignees, to whom he had previously paid the balance; shortly afterwards they brought an action of trover against him, for goods alleged to have been wrongfully converted by him; held, that an action could not be sustained, for by accepting from him the balance of the account, they affirmed his acts, and thereby recognised him as their agent in the sale of the bankrupt's goods; and having once affirmed his acts and treated him as their agent, they could not afterwards treat him as a wrong doer, nor could they affirm his acts in one part and avoid them as to the rest. If, on the other hand, they accepted the balance of the account as a satisfaction for the wrongful act, the acceptance of that sum was an answer to the action.<sup>b</sup> Where *A.* obtained bills of exchange from *B.*, upon a fraudulent representation that a void security which he had given him was sufficient; and *A.* having subsequently repented of what he had done, he returned to *B.* the bills, including the amount of one of them which he had discounted in bank notes, after he, *A.*, had committed an act of bankruptcy, and *B.* returned the security; held, that the assignees of *A.* could not maintain trover for these bills against *B.*, for the bills were obtained by *A.* by a criminal fraud, and therefore did not pass to his assignees, as nothing vests in them but such real and personal estate of the bankrupt in which he had the *equitable* as well as legal interest; and since, if they should recover, a court of equity would compel them to restore the bills, *B.*, on the rule to prevent a circuitry of action, was entitled to retain them.<sup>c</sup>

If the assignees affirm the acts of a wrongdoer, they cannot maintain trover against him.

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2.—*Assumpsit.* | Where there is a wrongful conversion of the bankrupt's property, the assignees have an election to bring trover or assumpsit,<sup>d</sup> but the former is more beneficial to them; for in trover the plaintiff may recover the full value of the goods, though the sale may not actually have produced more than half their worth; but in assumpsit, the assignees are only \*entitled to recover what the party really received, which is

When the assignees may bring assumpsit.

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<sup>a</sup> Jones v. Fort, 9 B. & C. 764. (17 Eng. C. L. 493.) 4 M. & R. 547.

<sup>b</sup> Brewer v. Sparrow, 7 B. & C. 310. (14 Eng. C. L. 50.)

<sup>c</sup> Gladstone v. Hadwen, 1 M. & S. 517.

<sup>d</sup> Hitchin v. Campbell, 2 Bl. 827. 3 Wils. 304.



Assump-  
sit.

only what the sale of the goods produced.<sup>a</sup> Trover is also more beneficial to the assignees in another respect, for by bringing assumpsit they affirm the contract, whereby the defendant is enabled to set off debts due to him by the bankrupt, which he could not do in trover.<sup>b</sup>

The assignees may maintain an action for money had against any person who has received money which ought to have been paid to them.

Effects at-  
tached  
abroad.

Where, after the issuing of the commission, and the assignment of a bankrupt's estate, a creditor, knowing the fact, and residing in England, attached the effects of the bankrupt abroad, whereby he received the amount of his debt; held, that the assignees might recover it from him in an action for money had and received; for the bankrupt's property abroad was vested in the assignees by the assignment, and they might dispose of it in the same manner, as if it was in this country; though if the law of the country in which it is situate required

Foreign  
attach-  
ment.

a particular mode of conveyance, that must be adopted.<sup>c</sup> So, where, after an act of bankruptcy had been committed, but before the assignment, a creditor attached the bankrupt's property; held, that the assignees might recover it in this form of action, for a creditor will not be permitted to gain priority by a foreign attachment.<sup>d</sup>

Payment  
to land-  
lord.

An action for money had and received will lie against a landlord for money paid to him for rent by the bankrupt, after an act of bankruptcy, in consequence of the landlord being about to distrain for it; for the landlord had a legal lien upon the goods in the bankrupt's possession at the time.<sup>e</sup>

Transfer  
of a bill af-  
ter bank-  
ruptcy.

*A.*, after committing an act of bankruptcy, indorses to *B.*, at whose suit he was arrested, a bill of exchange, which *C.* accepted in expectation of receiving goods to the amount from *A.*; *C.* receives the goods, and pays the amount of the bill to *B.*; held, that the assignees could not maintain an action against

\*287  
Granting  
an annuity

*B.*, \*for this money as money had and received to their use, their proper remedy being trover.<sup>f</sup> *A.* being a bankrupt, continues in possession of his estate, and grants an annuity out of certain premises to *B.* The tenant in possession pays the rent to *B.*, in order to prevent a distress. Held, that the assignees could not maintain an action for money had and received against *B.*<sup>g</sup>

Where, after an act of bankruptcy, the sheriff seized the bankrupt's goods in execution, after which a docket was struck, of which a creditor gave notice to the sheriff, and to prevent a sale, paid the demand; held, that the assignees could not, by

<sup>a</sup> Per Buller, J., in *King v. Leith*, 2 T. R. 144.

<sup>b</sup> *Smith v. Hodson*, 4 T. R. 211.

<sup>c</sup> *Hunter v. Potts*, 4 T. R. 182. *Phillips v. Hunter*, 2 H. Bl. 402.

<sup>d</sup> *Sill v. Worswick*, 1 H. Bl. 665.

<sup>e</sup> *Stephenson v. Wood*, 5 Esp. 200.

<sup>f</sup> *Waller v. Drakeford*, 1 Stark. 481. (2 Eng. C. L. 476.)

<sup>g</sup> *Darnton v. Pigman*, Peake's Add. Cas. 18.

repaying the creditor, maintain an action against the sheriff for money paid; as it had never been, in fact, the money of the bankrupt or his assignees.<sup>a</sup> Assump-  
sit.

Where money was deposited by a bankrupt in the hands of an arbitrator, who was to decide to whom it belonged; the arbitrator, before the commission issued, and without knowledge of any act of bankruptcy having been committed, paid the money over to the person who he thought was entitled to receive it; held, that the assignees could not recover it from the arbitrator in an action for money had; for it would be a great hardship, if persons who are made the gratuitous channels of conveyance or delivery, should be answerable for property passing through their hands, under circumstances which lead to a suspicion that the transfer may not be made lawfully.<sup>b</sup> An action  
will not lie  
against a  
mere car-  
rier or a  
gratuitous  
channel of  
convey-  
ance.

So where a trader, in prison, employed an auctioneer to sell goods, who sent him the proceeds by the defendant; the trader having become a bankrupt by lying in prison; held, that the assignees could not maintain an action for money had against the defendant, as he was but the mere channel of conveyance.<sup>c</sup> Nor can they in this form of action recover the amount of India stock transferred by the bankrupt after an act of bankruptcy; for stock is not money, and therefore no money had been received.<sup>d</sup> India  
stock:  
\*288

Where after an act of bankruptcy committed by a trader, a creditor received from the trader's bankers the amount of a draft drawn on them by the trader in favor of the creditor, and the assignees subsequently brought an action against the bankers for a larger sum of money belonging to the bankrupt, in which the bankers attempted to set-off the amount of the draft paid to the creditor, which was disallowed, because they paid it with full knowledge of the bankruptcy; the assignees afterwards brought an action against the creditor for the amount of the draft; held, that they were not entitled to recover; for they had an election, to bring an action against the bankers or the creditor, and having brought an action against the bankers, they, by disallowing the set-off, denied that the payment was made to the creditor on their account; therefore, they should not now be permitted to contradict it, and say that the money was received by him to their use. They could not affirm and disaffirm the same transaction.<sup>e</sup> The as-  
signees  
cannot af-  
firm and  
disaffirm  
the same  
trans-  
action.

The assignees may maintain an action for unliquidated damages, which had accrued before the bankruptcy by the non-performance of a contract; as where the bankrupt entered into a contract with the defendant, that the latter should supply him with a quantity of stone within a certain time, and at a certain rate, and the defendant failed in performing his part of the Damages  
for the  
non-per-  
formance  
of a con-  
tract.

<sup>a</sup> Bucker v. Booth, M. & M. 518. (22 Eng. C. L. 372.)

<sup>b</sup> Tope v. Hockin, 7 B. & C. 101. (14 Eng. C. L. 22.)

<sup>c</sup> Coles v. Wright, 4 Taunt. 198.

<sup>d</sup> Nitingale v. Devisme, 5 Burr. 2589.

<sup>e</sup> Vernon v. Hanson, 2 T. R. 287.

contract, whereby the bankrupt, before his bankruptcy, sustained a great loss, held, that his assignees might sue the defendant for the damages which the bankrupt thereby sustained; for the legislature intended to include in the 6 Geo. IV, c. 16, s. 63, all that could pass to the assignees under the former bankrupt laws, and the right of action here claimed passed by that clause, either as personal estate of the bankrupt or as a debt due to him, under the words, "all the present and future personal estate of such bankrupt." The absence of the word

\*289 \**"effects,"* which was in the former statute, made no difference. Under this statute, the assignees had power to sue upon contracts made with the bankrupt, and for injuries affecting his property, though not for mere personal wrongs, and such causes of action as would abate by his death.\*

When the assignees may bring debt.

3.—*Debt.*] The assignees of a bankrupt may recover in an action of debt, on the statute 9 Ann, c. 14, money lost at play by the bankrupt before his bankruptcy, for it is to be considered as part of the bankrupt's estate which has wrongfully passed to the winner;<sup>b</sup> and a release by the creditors to the bankrupt, a year after the commission, of all actions, causes of action, &c., which they *then* had against him, has been held not to destroy the assignees' right to maintain such an action; for as soon as the assignment was made under the commission, all that was *then* the bankrupt's would go to his assignees; and the fair and true construction of the release was, that it did not relate to things *before* effectually assigned, but to such things as might thereafter come to the bankrupt.<sup>c</sup>

The assignees are allowed to sue both in the *debet* and *detinet*, because the whole property of the bankrupt is vested in them by law.<sup>d</sup>

Covenant.

4.—*Covenant.*] The assignees may maintain covenant for rent on a lease by the bankrupt, and the lessee cannot plead that the lessor *nihil habuit in tenementis*, for the assignees are to all intents and purposes considered in the same situation as the lessor was before his bankruptcy, and the lessee was precluded by the lease from controverting the title of his landlord.<sup>e</sup> Where the bankrupt and the defendants were members of a joint stock company, and the bankrupt demised lands to the defendants as trustees of the company, who covenanted to pay him rent. By a separate deed, the bankrupt and other members of the company covenanted, when called upon, to do

\*290 \*and perform all such acts as were necessary to indemnify the defendants from all loss and damage which they might sustain

\* Wright v. Fairfield, 2 B. & Ad. 727. (22 Eng. C. L. 175.)

<sup>b</sup> Brandon v. Pate, 2 H. Bl. 308.

<sup>c</sup> Carter v. Abbott, 1 B. & C. 444. (8 Eng. C. L. 124.) 2 D. & R. 575.

<sup>d</sup> Per Buller, J., in Winter v. Kretchman, 2 T. R. 46.

<sup>e</sup> Parker v. Manning, 7 T. R. 537.

in the execution of their trusts. Held, that the assignees might sue the defendants on their covenant.<sup>a</sup>

*Quære.*—Whether a right to sue upon a covenant by a lessor, to offer to the lessee an option to purchase the premises, passes to the assignees of the lessee upon his bankruptcy.<sup>b</sup>

5.—*Trespass.*] Trespass will not lie against a sheriff for taking the bankrupt's goods in execution after an act of bankruptcy, the proper remedy being trover.<sup>c</sup> It seems that the assignees cannot maintain trespass for an injury done to the bankrupt's property before an act of bankruptcy, but if they do not interfere, the bankrupt himself may maintain such an action as trustees for them.<sup>d</sup>

When the assignees may maintain trespass.

But the assignees may maintain trespass in their own name, for any damage done to the property, while it is in their possession. Where the assignees of a bankrupt took possession of a farm and stock belonging to the bankrupt, and managed it for the benefit of the creditors, and purchased additional stock and farming utensils, and after having continued in possession for several months, the sheriff seized part of the stock, which had belonged to the bankrupt, under an execution sued out at the suit of a judgment creditor, for which the assignees, in their own name, and not in their character of assignees, brought an action of trespass against the sheriff; held, that the action was maintainable, for the assignees had been a considerable time in possession; they claimed the property legally as their own, though they acted as trustees for the general creditors; under such circumstances, the sheriff was to be deemed *prima facie* a trespasser. If they had sued as assignees, affirming the commission, it would have opened another consideration. The sheriff might be able to defend himself, by showing that the commission was invalid.<sup>e</sup>

\* Where the lessee of premises covenanted, on payment of a sum of money, to demise the premises to the bankrupt for a term, by a lease, containing covenants similar to those contained in the original lease, and the bankrupt covenanted to pay the rent, &c., in the same manner as if the lease were granted; the bankrupt took possession and paid the rent; the lessee having neglected to pay the rent to the superior landlord, he distrained the bankrupt's goods; held, that the agreement operated as a present demise, and that the assignees of the bankrupt might maintain an action against the lessee for the injury resulting to his estate from the distress.<sup>f</sup> So where a bankrupt hired a carriage of M., and let it to the defendant,

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Wrongful distress.

<sup>a</sup> Bedford v. Brutton, 1 Bing. N. C. 399. (27 Eng. C. L. 433.) 1 Scott, 245.

<sup>b</sup> Collison v. Lettsom, 6 Taunt. 224. (1 Eng. C. L. 365.)

<sup>c</sup> Smith v. Milles, 1 T. R. 475. See *ante*, 283.

<sup>d</sup> Clarke v. Calvert, 3 Moore, 96. (4 Eng. C. L. 266.)

<sup>e</sup> Bernasconi v. Fairbrother, 7 B. & C. 379. (14 Eng. C. L. 53.)

<sup>f</sup> Hancock v. Caffyn, 8 Bing. 359. (21 Eng. C. L. 318.) 1 M. & Scott, 521.

who sent it back damaged, to the bankrupt; *M.* having repaired the carriage with the consent of the bankrupt, proved the amount of repairs under the commission; held, that the assignees might maintain an action against the defendant for damages done, though no dividend was paid under the commission.<sup>a</sup>

**Joinder of assignees.** 6.—*Of the declaration.*] In actions *ex contractu* by assignees, they must all join, the non-joinder of one of them has been held to be a ground of non-suit;<sup>b</sup> but the non-joinder of any one of them in actions *ex delicto* can only be taken advantage of by a plea of abatement to the whole action, though the other assignees who sue, can only recover their proportional parts.<sup>c</sup> Where an order of court directed that *A.*, one of two assignees, should be removed, and *B.* appointed in his place; and *A.* did not concur in the reassignment to *B.*; held, that *B.* and the \*remaining assignee could not maintain an action of assumpsit in their character of assignees; for *A.* was still a necessary party to the action, as the legal estate continued in him until he made a reassignment, or until the commissioners made a new assignment.<sup>d</sup>

**Fresh assignment to new assignees.** But by 6 Geo. IV, c. 16, s. 66, it is enacted, that when a fresh assignment to new assignees has been ordered, the debts and personal estate of the bankrupt shall be thereby vested in the new assignees, and that it shall be lawful for them to sue for the same, &c., as effectually as the former assignees might have done; and that the new conveyance shall be valid without any conveyance from the former assignee. And by section 77, a suit or action shall not abate by the death or removal of an assignee, but the name of the new assignee shall be substituted in the place of the former, and the action prosecuted in the same manner as if the surviving and new assignee had originally commenced the same.<sup>e</sup>

**Action not to abate.** Where the provisional assignee brought assumpsit, and before the delivery of the declaration he assigned the estate to the new assignees who prosecuted the action in his name; held,

<sup>a</sup> *Porter v. Vorley*, 9 Bing. 93. (23 Eng. C. L. 272.) 2 M. & S. 141. But the assignees were entitled to nominal damages only.

<sup>b</sup> *Snellgrove v. Hunt*, 1 Chitt. R. 71. (18 Eng. C. L. 32.) 2 Stark. 424. (3 Eng. C. L. 414.) But in this case the contract declared upon, was exclusively made with the assignees, and therefore they did not, all together, sue in *autre droit*; and in general, where assignees sue on a contract with the bankrupt, there seems no reason why if two out of three be plaintiffs, the defendant should not be required (if he will set up the objection) to plead the non-joinder of the third in abatement, as in the case of the non-joinder of an executor. See *Alivon v. Furnival*, 1 Cr. M. & R. 290-6. 1 Chitt. Pl. 23.

<sup>c</sup> *Bloxam v. Hubbard*, 5 East, 407.

<sup>d</sup> *Aldritt v. Kettridge*, 1 Bing. 355. (8 Eng. C. L. 346.) 6 Moore, 569. (17 Eng. C. L. 58.)

<sup>e</sup> Proceedings in an action at the suit of assignees were allowed to be amended, by making the official assignee a joint plaintiff with the other assignees, in *Baker v. Neaver*, 1 C. & M. 112.



on a plea of *non assumpsit*, that it was no ground of nonsuit, for there was a privity between the provisional assignee and the new assignees; it was similar to the case of a plaintiff, who had commenced a suit, and afterwards became a bankrupt; his assignees might continue the suit in his name.<sup>a</sup> Where one of several partners becomes a bankrupt, an action for a partnership debt must be in the name of the assignees and the solvent partner;<sup>b</sup> and the Lord Chancellor, upon petition, may authorise the assignees to use the name of the solvent partner, without his consent; provided that such partner, if no benefit be claimed by him from the proceedings, be indemnified against

\*costs, &c.<sup>c</sup> Where the plaintiffs sued as assignees of *A.* and *B.*, and also as assignees of *C.*, for a joint demand due to the three bankrupts; the declaration was held sufficient, on a motion in arrest of judgment after verdict, for there was nothing on the record to show that the plaintiffs did not claim under a joint commission against all, or under separate commissions against each of the bankrupts; in either of which cases the action would be maintainable.<sup>d</sup> But assignees under separate *fiats* cannot recover in the same action a joint debt due from the defendant to both the bankrupts, and also separate debts due to each; where, in such a case, the jury assessed the damages severally on the separate counts, the court allowed the plaintiffs to enter up judgment on the counts for the joint debts due to both the bankrupts.<sup>e</sup>

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Joint debts and separate fiats.

Joint and separate debts.

The assignees under a joint fiat against two partners, may recover in the same action debts due to the partners jointly, and also debts due to them separately.<sup>f</sup> Where *A.* and *B.* were partners, and *A.* having committed an act of bankruptcy the sheriff seized the partnership effects of both in execution; held, that though *B.* had not committed an act of bankruptcy the assignees, under a joint commission, could not recover from the sheriff the amount of *A.*'s share of the goods seized by him, as it appeared that only one of the partners had, in fact, committed an act of bankruptcy.<sup>g</sup>

The assignees under a joint fiat against two partners, in an action on a separate contract entered into by one of the bankrupts, may describe themselves generally, as the assignees of that one only, without noticing the other.<sup>h</sup>

How the assignees should describe themselves.

If the cause of action arose to the bankrupt previously to the act of bankruptcy, and the bankrupt himself could have recovered, the assignees must declare in that character, and

<sup>a</sup> Page v. Bauer, 4 B. & A. 345. (6 Eng. C. L. 449.) But if the fact had been specially pleaded, the court said it might be otherwise.

<sup>b</sup> Thomason v. Frere, 10 East, 418. Eckhardt v. Wilson, 8 T. R. 140.

<sup>c</sup> Sec. 89.

<sup>d</sup> Streatfield v. Halliday, 3 T. R. 779.

<sup>e</sup> Hancock v. Haywood, 3 T. R. 433.

<sup>f</sup> Graham v. Mulcaster, 4 Bing. 115. (13 Eng. C. L. 367.) 12 Moore, 327.

<sup>g</sup> Hogg v. Bridges, 8 Taunt. 200. (4 Eng. C. L. 70.) 2 Moore, 122.

<sup>h</sup> Stonehouse v. De Silva, 3 Camp. 399. Harvey v. Morgan, 2 Stark. 17. (3 Eng. C. L. 222.)



\*294 describe themselves as assignees in the declaration; but if it arose after the bankruptcy, they *may* declare in their individual capacity, and not describe themselves as assignees in the declaration.<sup>a</sup> But they cannot join counts in their own right with others in their rights as assignees.<sup>b</sup> The assignees may allege their titles, by stating themselves to be the assignees of *A.*, a bankrupt within the meaning of the statute, &c., and without setting out the petitioning creditor's debt, commission, &c.<sup>c</sup> Where one of two partners became bankrupt before the other, and the assignees under a joint commission against both the partners, brought an action for money had and received to their own use as assignees, and also to the use of the bankrupts; it appeared that some of the money had been received by the defendant before the bankruptcy of either of the parties, and some after the bankruptcy of one of them; held, that they could not recover in that form of action; the counts should be framed so as to suit the nature of the transaction. They should have declared in one count for money had and received to the use of the partner who last became bankrupt, and of themselves as assignees.<sup>d</sup>

If the assignees under separate fiats against several persons sue jointly, they cannot describe themselves as assignees of all the bankrupts, but each set of assignees should be distinctly described as the assignees of the bankrupt whom they represent.<sup>e</sup> Where the defendant received money to the use of *A.* and *B.*, as assignees, and *B.* was afterwards removed; held, that *A.* being then the sole assignee might recover the money from the defendants in an action for money had and received to his own use as assignee, without mentioning *B.* at all.<sup>f</sup> It has been decided that a new assignee might, in his own name, maintain an \*action upon a judgment obtained by a former assignee, who had been displaced by the Lord Chancellor.<sup>g</sup>

\*295 Where assignees declared on an account stated *with the bankrupt*, and that the defendant promised to pay the plaintiffs, as assignees, and the evidence was, that the defendant accounted to the bankrupt and promised to pay him, but there was no evidence of a promise to the assignees; held sufficient for when an account was stated with the bankrupt, a debt was thereby created to him which was transferred to the assignees by the statute.<sup>h</sup>

<sup>a</sup> *Evans v. Mann*, Cowp. 569. *Thomas v. Rideing*, Wightw. 65. *Maltby v. Christie*, 1 Esp. 341. But by the new rules the character in which assignees sue, is not to be considered as in issue, unless specially denied. Reg. Gen. 4 W. IV, H. T. Reg. 21.

<sup>b</sup> Per Bayley, J., *Richardson v. Griffin*, 5 M. & S. 297.

<sup>c</sup> *Lawson v. Lamb*, 2 Lord Raym. 1548. 1 Lutw. 274. *Pepys v. Low*, Carth. 29. See *Fletcher v. Pogson*, 3 B. & C. 192. (10 Eng. C. L. 48.) *Winter v. Kretchman*, 2 T. R. 65.

<sup>d</sup> *Smith v. Goddard*, 3 B. & P. 465.

<sup>e</sup> *Ray v. Davies*, 8 Taunt. 134. (4 Eng. C. L. 45.) 1 Moore, 3.

<sup>f</sup> *Stewart v. Lee*, M. & M. 158. (22 Eng. C. L. 274.)

<sup>g</sup> *De Cosson v. Vaughan*, 10 East, 61.

<sup>h</sup> *Skinner v. Rebow*, Sel. N. P. 235.

7.—*The pleadings.*] The pleadings in actions by assignees, are the same as in similar actions by any other party. If the cause of action accrued before the act of bankruptcy, the defendant may set up any defence that he could have done in a similar action by the trader.

If the cause of action accrued after the act of bankruptcy, and the subject of it passed to the assignees, the defendant can set up no other defence to the action than he might have done if the action were brought, and would lie at the suit of the assignees in their individual capacity, except disputing the bankruptcy, or the plaintiff's title.<sup>a</sup>

And in all cases where the defendant intends to dispute the bankruptcy, he must, at or before pleading, give notice of the matter which he intends to dispute.<sup>b</sup>

8.—*Set off.*] The 6 Geo. IV, c. 16, s. 50, enacts, that where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him, and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or \*demand hereby made proveable against the estate of the bankrupt, may also be set off in manner aforesaid against such estate; provided that the person claiming the benefit of such set off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed. Mutual debts to be set off.

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The principle which the bankrupt laws seem to have in view from the earliest time to the last provisions made therein is this, that where two persons have dealt with each other on mutual credit, and one of them becomes bankrupt, the amount shall be settled between them, and the balance only payable on either side.<sup>c</sup>

The word *credit* is more comprehensive than the word *debt*, and the disposition of the court is, that all opposite demands shall be set off.<sup>d</sup> Where there is a trust between two men on each side, that makes mutual credit.<sup>e</sup> Mutual credit does not extend to a deposit of property, without any authority to turn it into money; therefore if cloths be left with a fuller to be dressed by a proprietor, who at the time of the delivery is indebted for a previous balance, and the proprietor becomes

<sup>a</sup> Arch. 337.<sup>b</sup> Sec. 90.<sup>c</sup> Per Tindal, C. J., in *Gibson v. Bell*, 1 Bing. N. C. 746. (27 Eng. C. L. 562.)<sup>d</sup> *Ex parte Deeze*, 1 Atkins, 228. *Atkinson v. Elliott*, 7 T. R. 378. See Mont. on set-off, 48; where all the cases on this point are collected.<sup>e</sup> Per Buller, J., *French v. Fenn*, Cooke, 565. By mutual credit a reciprocity of trust must be inferred. Per Dallas, J., in *Key v. Flint*, 8 Taunt. 22. (4 Eng. C. L. 4.)

bankrupt, the fuller cannot set off the debt due for the previous balance against a demand by the assignees for the cloths.<sup>a</sup> Mutual credit does not apply to a case where only part of a firm are bankrupts.<sup>b</sup> Where two out of three partners after having committed an act of bankruptcy gave a bill in the name of the firm to the defendant, to whom the firm were at that time indebted in a larger amount than the bill; held, in an action by the assignees of the two bankrupts and the solvent partner for the amount of the bills, that the defendants could not set off the debt due to them from the firm.<sup>c</sup>

**\*297** Mutual credit, although not confined to pecuniary transactions, is confined to such credits as must in their nature terminate in \*debts;<sup>d</sup> as a sum payable at a future day, or a delivery of property with directions to turn it into money.<sup>e</sup> *A.* having given defendant his acceptance for 20*l.*, defendant in consideration thereof, undertook to indorse to him a bill drawn on *B.* He gave the bill, but did not indorse it. *A.* having become bankrupt, and his acceptance having been dishonored, the defendant proved the amount under the commission, and *B.* having refused to pay his bill, unless indorsed by the defendant, the assignees of *A.* brought an action on the contract of the defendant to indorse the bill, to which he pleaded a set off; held, that the set off should not be allowed, for this was not a case of mutual credit; it was merely a cause of action arising from the non-performance of a contract. Parke, J. "The position with respect to mutual credits is confined to debts between the bankrupt and other parties, or to transactions necessarily ending in debts." Taunton, J. "The damages were unliquidated, and their amount dependent on circumstances. How could the commissioners in such a case have stated an amount between the parties as directed by the acts?"<sup>f</sup>

An unliquidated demand capable of being reduced to a certainty may be set off. In an action by assignees for not accepting a bill of exchange pursuant to an agreement with the bankrupt on balancing accounts, without alleging special damage, it was held that the defendant might set off money lent to the bankrupt, as the transactions constituted "mutual credits;" for, as the agreement was to accept a bill of exchange for a balance then due from the defendant to the bankrupt, and as there was no special damage alleged in the declaration, the measure of damages would necessarily be confined to the amount of the bill if drawn and the interest on it; so that the demand though unliquidated at the moment was capable of being reduced to a certainty by

<sup>a</sup> *Rose v. Hart*, 2 Moore, 547. (4 Eng. C. L. 185.)

<sup>b</sup> *Stainforth v. Fellows*, 1 Marsh, 190. (4 Eng. C. L. 335.)

<sup>c</sup> *Thomason v. Frere*, 10 East, 418.

<sup>d</sup> Per Bayley, J., *Easum v. Cato*, 5 B. & A. 866. (7 Eng. C. L. 282.)

<sup>e</sup> Per Gibbs, C. J., *Rose v. Hart*, 2 Moore, 547. 8 Taunt. 499. (4 Eng. C. L. 185.)

<sup>f</sup> *Rose v. Sims*, 1 B. & Ad. 521. (20 Eng. C. L. 437.) So a guarantee against contingent damages, which cannot terminate in a debt, is not the subject of mutual credit; *Sampson v. Burton*, 4 Moore, 516. (6 Eng. C. L. 28.)

calculation, and the commissioners or assignees might easily have stated an account between the parties. This case was distinguishable from *Rose v. Sims*, for there, if the indorsement \*had been made, it would not in its nature necessarily have terminated in a debt from the defendants, for the acceptor would have been the debtor, the indorser a guarantee only.\* \*298

So where the bankrupt was employed by a creditor to repair a carriage, under an agreement to pay him ready money, and the repairs were not complete until after his bankruptcy; held, that though the bankrupt was indebted to a greater amount to the creditor, his assignees had a lien on the carriage to the amount of the repairs; for the bankruptcy did not annul the bargain. There was no mutual credit of a nature to exclude the lien insisted upon. If there had been no contract to pay ready money, it would be otherwise. If, indeed, the assignees had delivered the carriage without insisting upon the agreement for ready money, and afterwards brought an action for the amount of the repairs, according to the case of *Cornforth v. Rivett*,<sup>b</sup> the creditor might set off his debt.\* A demand on contract to repair a carriage.

A party cannot avail himself of his own wrongful act to establish mutual credit. Where a trader deposited a bill with a creditor, to whom he was indebted on a general account, for the express purpose of having money advanced on it without reference to the general account, the creditor made an advance on the bill, but not to the entire amount, and the trader afterwards became a bankrupt. Held, that the creditor could not set off the debt on the general account against an action by the assignees for the bill, who tendered the amount advanced on it, for it was not a case of mutual trust (as the bill was entrusted to the creditor for the specific purpose of having money advanced;) but on the contrary, it was a gross breach of trust.<sup>c</sup> A demand founded in a wrongful act cannot be set off.

So where *A.*, being indebted to *B.*, remitted to him a bill of exchange to get it discounted, and to apply the proceeds in a particular way; *B.* did not get it discounted, but received payment of it when it became due, before which time *A.* became a \*bankrupt, after which he demanded the bills of *B.*; held, in an action by his assignees for the amount of the bill, that *B.* could not set off the debt due to him from *A.* If good bills are deposited for a specific object, and the bailor will not perform the object, he must return them. The property of the bailor is not divested or transferred until the object is performed; the bankrupt, therefore, had a right to have the bills returned. There was no substantial difference between this and the preceding case.\* \*299

<sup>a</sup> *Gibson v. Bell*, 1 Bing. N. C. 743. (27 Eng. C. L. 562.) 1 Hod. 136.

<sup>b</sup> 2 M. & S. 510.

<sup>c</sup> *Clarke v. Fell*, 4 B. & Ad. 404. (24 Eng. C. L. 87.)

<sup>d</sup> *Key v. Flint*, 3 Taunt. 21. (4 Eng. C. L. 3.) 1 Moore, 452. This was an action of trover, but the decision had no reference to the form of action, it was founded on the doctrine of mutual credit. See *ex parte Flint*, 1 Swan. 30.

<sup>e</sup> *Buchanan v. Findlay*, 9 B. & C. 738. (17 Eng. C. L. 486.)

If a trader being employed as an agent has money entrusted to him for the purpose of the agency, and he, instead of so employing it, applies to his own use, it is fraud, and does not constitute a credit.<sup>a</sup>

When a debt due from the bankrupt may be set off.

A debt contracted after notice of bankruptcy cannot be set off. Where a banker after notice of an act of bankruptcy received sums of money from the bankrupt and thereby paid his drafts; held, in an action by the assignees for the sums paid by the bankrupt, that the banker could not set off the payments made by him, for the money paid to the banker was the property of the assignees.<sup>b</sup> But notice of insolvency or of the trader's having stopped payment will not operate against a set off; therefore where country bankers committed an act of bankruptcy, after which a creditor obtained their notes, after notice of their stopping payment, but without notice of an act of bankruptcy; held, that he was entitled to set off the amount of the notes against his debt to the estate.<sup>c</sup> But if a party take notes of a bank, with notice that three out of four of the firm have committed an act of bankruptcy, he cannot set off the amount.<sup>d</sup> The defendant cannot set off cash notes issued by the bankrupt payable to bearer, bearing date before his bankruptcy, unless he shows that such notes came into his hands before the bankruptcy.<sup>e</sup> But proof that notes of the bankrupt, to the amount of the set off, were in the defendant's possession three weeks before the bankruptcy, has been held to be sufficient to justify the jury to infer that the notes in question were in his possession at the time of the bankruptcy.<sup>f</sup> Proof of the defendant's demand having been allowed by the commissioners as a debt, is not sufficient to establish a set off.<sup>g</sup>

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The debt must be proved to have been due before the act of bankruptcy on which the commission is founded, though it is immaterial whether it were then payable or not. Thus, if the holder of an acceptance buy goods of the acceptor, and the acceptor becomes bankrupt, the purchaser may set off the acceptance against the price of the goods.<sup>h</sup>

As to debts due from the creditor to the bankrupt, in order to render them available as a set off, they must be due before the act of bankruptcy.

A broker, who is indebted to assignees for premiums due to them upon policies subscribed by the bankrupt, is not entitled to set off returns of premium due upon the arrival of ships subsequent to the bankruptcy.<sup>i</sup> Where the indorser of a bill

<sup>a</sup> Whitaker v. Hall, 1 Glyn. & J. 313.

<sup>b</sup> Vernon v. Hankey, 2 T. R. 113. Tamplin v. Diggins, 2 Campb. 312.

<sup>c</sup> Hawkins v. Whitten, 10 B. & C. 217. (21 Eng. C. L. 60.) Dickson v. Cass 1 B. & Ad. 343. (20 Eng. C. L. 397.)

<sup>d</sup> *Id.*

<sup>e</sup> Dickson v. Evans, 4 T. R. 57. Lucas v. Marsh, Barnes, 453.

<sup>f</sup> Moore v. Wright, 6 Taunt. 517. (1 Eng. C. L. 469.)

<sup>g</sup> Pirie v. Mennett, 3 Campb. 279.

<sup>h</sup> Hankey v. Smith, 3 T. R. 507, n.

<sup>i</sup> Goldsmidt v. Lyon, 4 Taunt. 541. Glennie v. Edmunds, *id.* 775.

of exchange took it up and paid it after the bankruptcy of the acceptor; held, that he could not set it off against a demand by the assignees of the acceptor.<sup>a</sup> But if the holder of a bill of exchange buys goods of the acceptor before his bankruptcy, he may set off the acceptance against the debts, for mutual credit was constituted by taking the bill on the one hand and selling the goods on the other.<sup>b</sup> But if the bill had come into the defendant's hands after notice of an act of bankruptcy, it would be otherwise.

Where *A.* *B.* and *C.* embarked in a speculation, in which *A.* advanced the money requisite for carrying it on, and *B.* and *C.* were to pay him interest for their proportions until the adventure should terminate; *B.*, who was indebted to *A.* in another account also, became bankrupt, after which the proceeds of the speculation came into *A.*'s hands. *B.*'s assignees having brought an action for his share of the profits on the speculation; held, \*that *A.* might set off the entire amount of his claim against *B.*<sup>c</sup> Payments improperly made as the consideration for signing a composition deed, may be deducted or set off from a proof made under a subsequent fiat for a subsequent debt.<sup>d</sup>

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Set off must be specially pleaded.<sup>e</sup> A plea of set off to an action by the assignees of a bankrupt, must show that it is pleaded to a debt to which it is strictly applicable. Therefore where to a count in debt by the assignees of a bankrupt for money had and received by the defendant to the use of the plaintiffs as assignees, (not stating whether received before or since the bankruptcy,) the defendant pleaded a set off for money due to him on an account stated with the bankrupt before the bankruptcy; held, that the plea was bad, for it was fraud generally to embrace both claims, and it ought to have expressly shown that the claim to which it was intended to apply was one to which it was applicable.<sup>f</sup>

## SECTION VII.

### ACTIONS AGAINST ASSIGNEES.

By 6 Geo. IV, c. 16, s. 44, every action brought against any person for any thing done in pursuance of this act, shall be commenced within three calendar months next after the fact committed; and the defendant or defendants in such action

Limita-  
tion of ac-  
tions.

<sup>a</sup> *Ex parte* Hale, 3 Ves. 304. Mont. Set Off, 62.

<sup>b</sup> *Hankey v. Smith*, 3 T. R. 509.

<sup>c</sup> *French v. Fenn, Cooke*, 565.

<sup>d</sup> *Ex parte* Minton, 1 Mon. & Ay, 440.

<sup>e</sup> See *ante*, 154, 159.

<sup>f</sup> *Groom v. Mealey*, 2 Bing. N. C. 138. (29 Eng. C. L. 285.) 1 Hodges, 212.



General  
issue.

may plead the general issue, and give this act and the special matter in evidence at the trial, and that the same was done by authority of this act; and if it shall appear so to have been done, or that such action was commenced after the time before limited for bringing the same, the jury shall find for the defendant or defendants; and if there be a verdict for the defendant or defendants, or if the plaintiff or plaintiffs shall be nonsuited, or discontinue his or their action or suit after appearance <sup>\*thereto</sup>, or if upon demurrer, judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall recover double costs.

<sup>\*302</sup>  
Double  
costs.

No action  
to be  
brought on  
dividends.

By sec. 111. No action for any dividend shall be brought against the assignees by any creditor who shall have proved under the commission, but if the assignees shall refuse to pay any such dividend, the Lord Chancellor may, on petition, order payment thereof, with interest for the time that it shall have been withheld, and the costs of the application.

The 44th  
section  
protects  
only acts  
done pur-  
suant to  
the direc-  
tions of  
the statute

In the repealed statute, 39 Geo. III, c. 184, the limitation of actions extended to any thing done "in pursuance and '*under color*' of the statute." The words "under color" are omitted in the present statute. It has been decided, that the provisions of section 44 do not apply to actions against assignees, so as to entitle them to notice, or to double costs in case of a verdict being in their favor.<sup>a</sup> Therefore trover for a chariot seized by assignees on the premises of the bankrupt was held to be maintainable, although the action was not commenced against them within three months after the seizure.<sup>b</sup> So where assignees entered the premises of a third person to seize part of the bankrupt's goods; held, not to be within the protection of this enactment, as not an act done pursuant to the statute. Bayley, J., observed that "the statute does not give the assignee any express power to seize the goods of the bankrupt, but vests the property in him, and clothes him with all the rights resulting from the ownership of the property; but though the ownership is given to him in this manner, his acts as owner were not done in pursuance of the statute. The right construction of the clause appears to be this: if the assignee does an act directed by the statute, but does it erroneously, he is protected; but if he does the act as the result of his ownership of that which was the bankrupt's property, and not by the direction of the statute, that is not done in pursuance of the statute, and he is responsible for it."<sup>c</sup>

Lease-  
holds.

<sup>\*303</sup>

The general assignment of a bankrupt's personal estate under <sup>\*the</sup> commission does not vest a term of years in the assignees, unless they do some act to manifest their assent to the

<sup>a</sup> *Worth v. Budd*, 2 B. & Ad. 172. (22 Eng. C. L. 53.) *Munk v. Clark*, 10 Bing. 103. (25 Eng. C. L. 45.) *Knight v. Turquand*, 2 Mees. & W. 106. This was the case of an official assignee.

<sup>b</sup> *Caruthers v. Payne*, 5 Bing. 370. (15 Eng. C. L. 447.) 2 M. & P. 420.

<sup>c</sup> *Edge v. Parker*, 8 B. & C. 697. (15 Eng. C. L. 328.)

assignment as regards the term and their acceptance of the estate; therefore, unless they elect to take the premises comprised in the lease, they will not be liable in respect of the rent and covenant;<sup>a</sup> and even if they have taken possession, they may discharge themselves from all future liability by assigning their interests over even to a pauper, or to a person leaving the kingdom, if the assignment be made before his departure.<sup>b</sup>

Where the holder of a bill of exchange, who held it in trust for *A.*, sued the drawer, and pending the suit became a bankrupt, and his assignees afterwards brought an action against the drawer in the bankrupt's name, in which action, the sheriff having been guilty of an escape on mesne process, the assignees recovered against the sheriff in an action for the escape, damages to the amount of the bill; held, that *A.*, might maintain money had and received against the assignees for the damages so recovered, allowing to them the costs and expenses; for though the money was recovered from the sheriff in the shape of damages for his misconduct, yet that was the means by which the defendants obtained the fruit of the original action, to which they were not entitled for their own benefit, but for the benefit of the plaintiff<sup>c</sup>.

Property in the possession of the bankrupt as trustee does not pass to the assignees.

## \*SECTION VII.

\*304

### EVIDENCE.

In actions by assignees, if proof of their title to sue be necessary, they must prove—first, the fiat; secondly, the trading; thirdly, the act of bankruptcy; fourthly, the petitioning creditor's debt.

By 6 Geo. IV, c. 16, s. 19, it is enacted, that in any action by or against any assignee, or in any action against any commissioner or person acting under the warrant of the commissioners for any thing done as such commissioner, or under such warrant, no proof shall be required at the trial of the petitioning creditor's debt or debts, or of the trading or act or acts of bankruptcy, respectively, unless the other party in such action shall, if defendant, at or before pleading, and, if plaintiff, before issue joined, give notice in writing to such assignee, commissioner, or

In actions by or against assignees, &c., if their title be denied, notice should be given of the matter

<sup>a</sup> *Copeland v. Stephens*, 1 B. & A. 593. *Turner v. Richardson*, 7 East, 335. *Bourdillon v. Dalton*, Peake, 238.

<sup>b</sup> *Taylor v. Shum*, 1 B. & P. 21. Where the bankrupt had a lease of premises and also a reversionary interest in them, and the assignees executed an assignment of all the bankrupt's estate; held, that he must be taken to have assigned the lease, and consequently to have accepted of it. *Page v. Godden*, 3 Stark. 309. (3 Eng. C. L. 358.)

<sup>c</sup> *Randoll v. Bell*, 1 M. & S. 714. *Dissentiente*, Lord Ellenborough.

intended  
to be dis-  
puted.

other person, that he intends to dispute some and which of such matters; and in case such notice shall have been given, if such assignee, commissioner, or other person shall prove the matter so disputed, or the other party admit the same, the judge before whom the cause shall be tried may (if he thinks fit) grant a certificate of such proof or admission; and such assignee, commissioner, or other person shall be entitled to the costs to be taxed by the proper officer occasioned by such notice, and such costs shall, if such assignee, commissioner, or other person shall obtain a verdict, be added to the costs; and if the other party shall obtain a verdict, shall be deducted from the costs which such other party would otherwise be entitled to receive from such assignee, commissioner, or other person.

\*305 It has been decided under this section, that the notice must specify, which of the three matters, viz: the trading, the petitioning creditor's debt, or the act of bankruptcy, is intended to be disputed; a notice of an intention to dispute *the bankruptcy* is too general and 'insufficient.'<sup>a</sup> This section \*relates only to actions brought by or against assignees, or commissioners, or persons acting under their warrant, "but it is not confined to cases where the assignees are named as such upon the record; it applies where the opposite party knows they make out their title under the commission."<sup>b</sup> It also extends to actions where there are other defendants on the record, if those defendants justify as servants of the assignees.<sup>c</sup> The notice, if by the defendant, should be served at or before pleading; if no notice has been given before the time of the plea, the court will give the defendant leave to withdraw the plea, in order to plead again with notice.<sup>d</sup> Unless proper notice is given, no proof of the petitioning creditor's debt, trading, or act of bankruptcy is required.<sup>e</sup>

In an action by assignees against the sheriff, for goods seized under a *fi. fa.*; the defendant gave no notice to dispute. The plaintiffs proved that an act of bankruptcy had been committed before the levy. It was held, by Lord Tenterden and Parke, J., that it was not necessary for the plaintiffs to prove a good petitioning creditor's debt; for the omission to give notice, admitted every thing that was necessary to support the commission, and as one act of bankruptcy was proved, the court would not presume that any other was committed.<sup>f</sup>

<sup>a</sup> Trimley v. Unwin, 6 B. & C. 537. (13 Eng. C. L. 248.) This notice must be given, though the denial of the bankruptcy appear on the record by the new rules of pleading. Moon v. Raphael, 2 Bing. N. C. 310. (29 Eng. C. L. 345.) 1 Hodg. 299.

<sup>b</sup> Per Lord Ellenborough, C. J., in Simmonds v. Knight, 3 Camp. 252.

<sup>c</sup> Gilman v. Cousins, 2 Stark. 182. (3 Eng. C. L. 305.)

<sup>d</sup> Radmore v. Gould, 1 Wight, 80. Poole v. Bell, 1 Stark. 328. (2 Eng. C. L. 410.)

<sup>e</sup> M'Beath v. Coates, 4 Bing. 34. (13 Eng. C. L. 330.) 12 Moore, 122.

<sup>f</sup> Norman v. Booth, 10 B. & C. 703. (21 Eng. C. L. 151.) Bayley and Littledale, JJ., considered that, under the circumstances, it was incumbent on the assignees to

The notice here required is no part of the evidence in the cause. It may be proved as soon as the commission is produced, and it immediately puts the opposite party on strict proof of the trading, petitioning creditor's debt and act of bankruptcy.\* Where in an action by assignees, the plea denied their title and notice to dispute the trading, &c., was given; held, that letters from the defendant to one of the assignees, \*deprecating proceedings against him, were evidence of the plaintiff's title to sue as assignees.<sup>b</sup> \*306

By 6 Geo. IV, c. 16, s. 92, it is enacted, that if the bankrupt shall not (if he was within the United Kingdom at the issuing of the commission) within two calendar months after the adjudication, or (if he was out of the United Kingdom) within twelve calendar months of the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners at the time of or previous to the adjudication of the petitioning creditor's debt or debts, and of the trading and act or acts of bankruptcy, shall be conclusive evidence of the matters therein respectively contained, in all actions at law, or suits in equity, brought by the assignees for any debt or demand for which the bankrupt might have sustained any action or suit. Depositions conclusive in actions by assignees for debts of the bankrupt, unless he dispute the commission.

It will be necessary to observe the distinction between the wording of the 90th and the 92d clauses; in the latter, where no power is given to the party to contest the bankruptcy, the depositions must be produced, which are declared *conclusive evidence* of the debt, trading, and act of bankruptcy; on the other hand, where the party is entitled to dispute the bankruptcy, either upon an action by assignees for a debt, or demand for which the bankrupt could not sue, or upon an action against any commissioner, or person acting under the warrant of the commissioner, *no proof* of these matters is to be required at all, unless the requisite notice has been given.<sup>c</sup>

It has been decided under this enactment, that where in an action by assignees, the declaration contained some counts on which the bankrupt might have sued, and others on which he could not, the proceedings under the commission were admissible as evidence of the matter therein contained, provided the assignees elected to proceed *only* on those counts on which he bankrupt might have recovered.<sup>d</sup> But the propriety of this \* decision was doubted in the following case, on the grounds \*307 that it turned rather on the form of the statement on the record

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prove a good petitioning creditor's debt. But the opinion of the former judges was subsequently recognised by the Court of Exchequer, H. T. 1837. The case is not yet reported.

\* *Decharme v. Lane*, 2 Campb. 324. See *Butt v. Frost*, *post.* Add.

<sup>b</sup> *Inglis v. Spence*, 1 C. M. & R. 432.      \* *Eden*, 370.

<sup>c</sup> *Jones v. Fort*, M. & M. 196. (22 Eng. C. L. 289.) *Gibson v. Oldfield*, 4 C. & P. 314. (19 Eng. C. L. 403.)

than on the facts. Whereas by the true construction of the provision, the depositions were conclusive evidence in all cases where the facts would have entitled the bankrupt to bring an action.

The depositions are conclusive in all cases where the bankrupt could have sued.

In trover by assignees alleging a conversion after the bankruptcy, it appeared from the statement of counsel, that the action was brought to recover the value of goods sold for cash by the bankrupt to the defendant, before the bankruptcy, and that the defendant refused to pay for them, but claimed to set off some running acceptances of the bankrupt, which he had in his hands. On this statement of the facts, the court held, that though the *record* did not show that the bankrupt, might himself have sustained an action, yet, as it appeared from the statement of the facts that he might, the depositions were admissible in evidence, and conclusive of the matter therein contained; for the real question was, whether the bankrupt, if there had been no bankruptcy, could have maintained an action which could be ascertained not from the form of the declaration, but from the state of the facts, and it was evident that the bankrupt could have sued in this case. The object of the legislature was to afford facilities for the recovery of debts due to the bankrupt, and that object would be best advanced by this mode of construction.<sup>a</sup>

Where the action is commenced within two months of the adjudication.

By the term *conclusive evidence*, is to be understood that no evidence is to be admitted to contradict the depositions. In an action by the assignees, where the bankrupt if solvent could have sued, and the defendant within two months gave notice to dispute the petitioning creditor's debt, and the act of bankruptcy, but the bankrupt did not give notice to dispute the commission, the depositions under the commission were held to be conclusive evidence of the matter contained in them, for the contingency upon which the 92d section depends, is ascertained at the expiration of the two months, and an action commenced

\*308 The court to judge of the sufficiency of the debt, &c.

\*before the expiration of that period, is not exempted from its operation.<sup>b</sup> But it is still open to the court, if the objection be taken before verdict, to consider whether the debt, trading, or act of bankruptcy as stated in the depositions, be in law sufficient.<sup>c</sup> As where the depositions stated a debt due from the bankrupt, as drawer of a bill of exchange, but did not state any presentment to the acceptor; held, not sufficient evidence of the debt.<sup>d</sup> So, where the deposition of the petitioning creditor stated, that a debt was due to him at and before the suing out of the commission, not showing that it existed before the act of bankruptcy; held insufficient.<sup>e</sup> But a depo-

<sup>a</sup> *Kitchener v. Power*, 3 Ad. & Ell. 232. (30 Eng. C. L. 81.) 4 N. & M. 710. 1 H. & W. 174. *Fox v. Mahoney*, 2 C. & J. 325. *Smith v. Woodward*, 4 C. & P. 541. (19 Eng. C. L. 517.)

<sup>b</sup> *Earith v. Schroder*, M. & M. 24. (22 Eng. C. L. 237.)

<sup>c</sup> *Jacobs v. Latour*, 5 Bing. 131. (15 Eng. C. L. 388.) 2 M. & P. 20.

<sup>d</sup> *Cooper v. Machin*, 1 Bing. 426. (8 Eng. C. L. 367.)

<sup>e</sup> *Lawson v. Robinson*, 1 Stark. 456. (2 Eng. C. L. 468.) See *Clark v. Askew*, *id.* 458. *Marsh v. Meager*, *id.* 353. (2 Eng. C. L. 423.)



sition stating that the deponent saw the bankrupt execute a deed, which was an assignment of all effects, has been held sufficient without producing the deed.<sup>a</sup> Where the assignees in consequence of a notice to dispute, without advertising to the 92d section, or relying on the depositions, unnecessarily went into evidence of trading, and failed in establishing it, and were nonsuited, the court refused to set the nonsuit aside.<sup>b</sup>

It is only in suits brought by the bankrupt's own assignees for a debt or demand for which he might have sued, that the depositions in a commission against him are made evidence; therefore, where the debt of the petitioning creditor was due to him as assignee of another bankrupt, it is not sufficient in order to support that debt to produce the proceedings under the latter fiat, but the petitioning creditor's debt, trading, and act of bankruptcy on which the latter fiat was founded, must be proved by ordinary evidence.<sup>c</sup> Where the petitioning creditor is assignee of another bankrupt, and the debt is due to him in that character, and his bill comes incidentally in question, strict evidence of his title as assignee must be given.<sup>d</sup> But where, in an action by an assignee, no notice has been given to dispute the commission, the depositions under the commission are evidence of a debt due to the party in the character in which he claims it, and no other evidence of the first bankruptcy will in that case be necessary.<sup>e</sup>

The depositions are conclusive only in actions by the assignees.

\*309

But where the defendant does any act which can be construed into a recognition of the title of the assignee, it supercedes the necessity of giving stricter evidence of it; as where he attended before a meeting of the commissioners and exhibited an account between him and the bankrupt, and afterwards made part payment to the assignee on that account; held, to be prima facie evidence as against him, that the plaintiff was assignee.<sup>f</sup> So where the defendant, as auctioneer, had advertised the property which was the subject of the action, as the property of *A. B.*, a bankrupt.<sup>g</sup> So where on an application by the assignee, he said he would call and pay the money; held, to be an admission of the title of the assignee.<sup>h</sup>

When the defendant has recognised the title of the assignees, no other evidence of it is necessary.

Where strict proof of the title of the assignees will be required, the petitioning creditor's debt must be proved by the same evidence that would be required to support an action at the suit of the petitioning creditor against the bankrupt for the amount of it.<sup>i</sup> All admissions and acts by the bankrupt pre-

What evidence will be sufficient when strict

<sup>a</sup> *Kay v. Stead*, 2 Stark. 200. (3 Eng. C. L. 313.)

<sup>b</sup> *Johnson v. Piper*, 2 Nev. & M. 672. (28 Eng. C. L. 375.)

<sup>c</sup> *Muskett v. Drummond*, 10 B. & C. 153. (21 Eng. C. L. 48.)

<sup>d</sup> *Doe v. Liston*, 4 Taunt. 741. But see *Skaife v. Howard*, 2 B. & C. 560. (9 Eng. C. L. 178.)

<sup>e</sup> *Skaife v. Howard*, 2 B. & C. 560. (9 Eng. C. L. 178.)

<sup>f</sup> *Dickenson v. Coward*, 1 B. & A. 677. *Giles v. Smith*, 1 C. M. & R. 462.

<sup>g</sup> *Ledbetter v. Salt*, 4 Bing. 623. (15 Eng. C. L. 91.)

<sup>h</sup> *Pope v. Monk*, 2 C. & P. 112. (12 Eng. C. L. 50.)

<sup>i</sup> B. N. P. 37.



proof is required. viously to his bankruptcy, are admissible in evidence to support the petitioning creditor's debt.<sup>a</sup> But admissions, or acts done by the bankrupt after his bankruptcy, are inadmissible, except in actions by himself.<sup>b</sup> The trading and act of bankruptcy must be proved in the ordinary way by persons who can swear to the fact from their own knowledge. In trespass for taking the goods of the plaintiff, the defendants justified taking them as assignees of one *M.*, whose property they had been; the plaintiff replied, that they were not the goods of the defendants, but his goods; held, that the replication admitted the proceedings under the fiat.<sup>c</sup>

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Proof of  
the fiat  
and pro-  
ceedings  
under it.

Proof of the fiat, and other proceedings under it, was regulated by 6 Geo. IV, c. 16, s. 96, and 97, until by the 2 & 3 Will. IV, c. 114, reciting that the previous enactments had been found defective, it was enacted by section 2, that all commissions issued before the 1st September, 1825, and all depositions and other proceedings relating to such commissions directed to be enrolled and actually entered of record upon or since that day, shall be deemed and taken to have been well and effectually entered of record. By section 3, the certificate of such entry, purporting to be signed by the person appointed to enter such proceedings, or by his deputy, shall have the same effect as if such commission had been issued after the 1st September, 1825, and shall be received in evidence without proof of the appointment or handwriting of such person.

By section 4, any of the judges of the court of bankruptcy may direct any commission theretofore issued, and the depositions and proceedings under the same, to be entered upon the records of the court.

Fiat and  
proceed-  
ings under  
it to be en-  
tered of  
record;

By section 5, all fiats already issued or thereafter to be issued, in lieu of commissions, to be prosecuted elsewhere than in the court of bankruptcy, and all adjudications and all appointments of assignees and certificates of conformity made and allowed under such fiats, may and shall be entered of record in the said court of bankruptcy, upon the application of or on behalf of any person interested therein.

Otherwise  
not to be  
received  
in evi-  
dence.

By section 8, no fiat issued or to be issued in lieu of a commission, whether prosecuted in the court of bankruptcy or elsewhere, nor any adjudication of bankruptcy or appointment of assignees, or certificate of conformity under such fiat, shall be received in evidence in any court of law or equity, unless the same shall have been first entered of record in the court of bankruptcy as aforesaid.

Proceed-  
ings in

And by section 9, upon the production in evidence of any commission, fiat, adjudication, assignment, appointment of

<sup>a</sup> *Downton v. Cross*, 1 Esp. 168. *Watts v. Thorpe*, 1 Campb. 376. *Scott v. Thomas*, 6 C. & P. 611. (25 Eng. C. L. 562.)

<sup>b</sup> Arch. 339.

<sup>c</sup> *Jones v. Bowman*, 1 Bing. N. C. 484. (27 Eng. C. L. 468.). *Nam. Jones v. Brown*, 1 Hodges, 33.

assignees, certificate, deposition, or other proceeding in bankruptcy, purporting to be sealed with the seal of the said court of bankruptcy, or of any writing purporting to be a copy of any such document, and purporting to be sealed as aforesaid, the same shall be received as evidence of such documents respectively, and of the same having been so entered of record <sup>as aforesaid, without any further proof thereof;</sup> <sup>provided,</sup> nevertheless, that all fiats and proceedings under the same which may have been entered of record before the passing of this act, shall and may upon production with the certificate thereon, purporting to be signed by the person so appointed to enter proceedings in bankruptcy, or by his deputy, be received as evidence of the same having been duly entered of record, any thing herein contained notwithstanding.

bankrupt-  
cy pur-  
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with the  
seal of the  
court to be  
received  
as evi-  
dence.  
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## SECTION IX.

### WHO MAY BE A WITNESS.

It is a universal rule, that the bankrupt himself is not a competent witness to prove any fact to support or impeach the commission, either on an issue to try the bankruptcy or in an action by the assignees to recover a debt due to the estate, even though he shall have obtained his certificate, and have released the assignees; for he is interested in the certificate which is founded in the bankruptcy, inasmuch, that if the commission should be superseded, the certificate would become void, and consequently he would be liable to the debts from which the certificate would discharge him.<sup>b</sup> Nor can he be cross examined as to any fact necessary to support or defeat the commission.<sup>c</sup> Nor can he be asked questions with a view to establish an antecedent act of bankruptcy.<sup>d</sup> But the rule is restricted to evidence affirming or disaffirming the bankruptcy. Therefore <sup>in an action by the assignees to recover money</sup> levied in an execution on a warrant of attorney, the bankrupt

Compe-  
tency of  
the bank-  
rupt to  
give evi-  
dence.  
\*312

<sup>a</sup> In trover by a bankrupt against his assignees to try the validity of the commission, it was held, that secondary evidence of the assignment was admissible after proof of its being lost before it was entered of record. *Giles v. Smith*, 1 C. M. & R. 462.

<sup>b</sup> *Cross v. Fox*, 2 H. Bl. 281, *n.* *Chapman v. Gardner*, *id.* *Flower v. Herbert*, *id.* *n.* *Field, v. Curtis*, 2 Stra. 829. 2 Stark. Ev. 132. 2 Phil. 90, 336. The principle of this rule has been doubted; see 2 Phil. Ev. 335. And in one instance departed from; see *Oxlade v. Perchard*, 1 Esp. 287; but that decision was overruled in *Rabbett v. Gurney*, 1 Mont. 489.

<sup>c</sup> *Binns v. Tetley*, M'Clel. & Y. 397. *Elsom v. Bailey*, 1 S. N. P. 262. But see *Fletcher v. Woodman*, S. N. P. 262, *n. contra.* Neither can he be examined to explain an unequivocal act of bankruptcy. *Hoffman v. Pitt*, 5 Esp. 22.

<sup>d</sup> *Wyatt v. Wilkinson*, 5 Esp. 187.

has been admitted to prove that the defendant knew of his insolvency at the time when the execution was issued.<sup>a</sup> So by having obtained his certificate and released his assignees, he is rendered a competent witness to increase the estate, as by proving property in himself.<sup>b</sup> Where a party made a composition with his *principal* creditors, paying the smaller ones in full, and afterwards became a bankrupt and obtained his certificate, but did not pay 15s. in the pound; held, that having released his surplus, he was a competent witness in an action by the assignees.<sup>c</sup> But even though he has not obtained his certificate, he is a competent witness to diminish the fund, because in so doing he gives evidence against his own interest.<sup>d</sup> But after a second act of bankruptcy he cannot give evidence to increase the fund, even though he is certified and gives a release, if he has not paid 15s. in the pound, because his future effects are liable in the event of his not making such payment.<sup>e</sup> He is competent to prove the handwriting of the commissioners in order to identify the proceedings under the commission, if he be certificated and has released the surplus, for the validity of the commission does not depend on that signature, but on the facts contained in the depositions to which the signature is subscribed.<sup>f</sup>

**Release.** In an action by the assignees to recover money lost by the bankrupt at play, the bankrupt having obtained his certificate was called as a witness; held, that he was not competent, because if the action was well founded, his certificate was void; but that his competency was restored by three releases that were then given in evidence, namely, a release from the bankrupt to his assignees, a release from all the creditors to the bankrupt, and a release from an assignee who was not a creditor to the bankrupt.<sup>g</sup> Where the certificate and release of a  
 \*313 \*bankrupt are necessary to render him a competent witness, both should be produced at the trial, or their non-production accounted for; the production of the release alone is not sufficient.<sup>h</sup> In a suit against the crown, his release will not render him a competent witness, the crown not being bound by the bankrupt laws.<sup>i</sup> Where in an action against several, one pleads his bankruptcy and the plaintiff enters a *nolle prosequi*

<sup>a</sup> Reed v. James, 1 Stark. 134. (2 Eng. C. L. 327.) And see Morgan v. Prior, 2 Phil. Ev. 336.

<sup>b</sup> B. N. P. 43. See Nans v. Saxby, cited 2 T. R. 497.

<sup>c</sup> Roberts v. Harris, 2 C. M. & R. 292. 1 Gale, 231.

<sup>d</sup> *Id.* Per Curiam, in Langden v. Walker, Cowp. 70, 2 Phil. Ev. 336. Butler v. Cooke, *id.*

<sup>e</sup> Kennet v. Greenwallors, Peake, 3.

<sup>f</sup> Morgan v. Prior, 2 B. & C. 14. (9 Eng. C. L. 8.)

<sup>g</sup> Carter v. Abbott, 1 B. & C. 444. (8 Eng. C. L. 124.)

<sup>h</sup> Goodhay v. Hendry, M. & M. 319. (22 Eng. C. L. 321.) Tenant v. Strachan, 4 C. & P. 31. (19 Eng. C. L. 261.) Arch. 351.

<sup>i</sup> Crawford v. The Attorney General, 7 Price, 2.

as to him, he is thereby rendered a competent witness for the defendants.<sup>a</sup>

The bankrupt's wife is not competent to prove an act of bankruptcy committed by her husband.<sup>b</sup> In one case the wife was admitted to prove payment made by her husband to the defendant in contemplation of bankruptcy;<sup>c</sup> but that decision seems to be questionable.<sup>d</sup> Competency of the wife.

A creditor is not a competent witness to increase the fund out of which he may receive a dividend, and therefore upon an issue out of chancery, to try whether the bankrupt had, within one year before his bankruptcy, lost five pounds in one day at gaming, it was held that a creditor was an incompetent witness, because he would be entitled to a share of the bankrupt's allowance forfeited by the gaming;<sup>e</sup> even though he has not proved under the commission he is incompetent.<sup>f</sup> A creditor may be rendered competent by a release to the assignees, without a release to the bankrupt.<sup>g</sup> Or if he has sold his debt or has agreed to sell it, because his interest is then gone, he is merely a trustee for the purchaser.<sup>h</sup> Competency of a creditor.

The petitioning creditor is not competent to prove the bankruptcy regularly sued out, on account of the bond entered into by him to the Lord Chancellor, conditioned to establish the facts upon which its validity depends.<sup>i</sup> But he is competent to give evidence to upset the commission, (as by showing that the act of bankruptcy was concerted between himself and the bankrupt,) or to cut down his own debt.<sup>j</sup> Petitioning creditor.

An assignee who has released his individual claims on the estate, is competent to give evidence in matters relating to the bankrupt's estate. In an action by an execution creditor of the bankrupt against the sheriff, for a false return, it was held, an assignee who had released his debt was a competent witness to prove a prior bankruptcy.<sup>k</sup> Competency of assignee.

A commissioner may be examined in support of the commission, as he cannot be compelled to refund the fees which he has received, even if the commission be upset; he has, therefore, no interest in the result.<sup>l</sup> Commissioners.

<sup>a</sup> *M'Iver v. Humble*, 16 East, 171. *Moody v. King*, 2 B. & C. 558. (9 Eng. C. L. 177.) *Eden*, 364.

<sup>b</sup> *Ex parte James*, 1 P. Wms. 611.

<sup>c</sup> *Jourdaine v. Lefevre*, 1 Esp. 66.

<sup>d</sup> See 2 Stark. Ev. 134. *Eden*, 362. 2 Phil. Ev. 338.

<sup>e</sup> *Shuttleworth v. Bravo*, Stra. 507.

<sup>f</sup> *Adams v. Malkin*, 3 Camp. 543. *Crook v. Edwards*, 2 Stark. 302, (3 Eng. C. L. 355,) overruling *Williams v. Stephens*, 2 Camp. 301.

<sup>g</sup> *Ambrose v. Clendon*, Cas. Temp. Hard. 267. *Koopes v. Chapman*, Peake, 19. *Sinclair v. Stevenson*, 2 Bing. 514. (9 Eng. C. L. 505.) 10 Moore, 46. 1 C. & P. 582. (11 Eng. C. L. 480.)

<sup>h</sup> *Granger v. Furlong*, 2 Bl. 1273. *Heath v. Hall*, 4 Taunt. 326.

<sup>i</sup> *Green v. Jones*, 2 Campb. 411.

<sup>j</sup> *Lloyd v. Stretton*, 1 Stark. 40. (2 Eng. C. L. 286.) *Eden*, 365.

<sup>k</sup> *Tomlinson v. Wilkes*, 5 Moore, 173. 2 B. & B. 397. (6 Eng. C. L. 168.)

<sup>l</sup> *Crooke v. Edwards*, 2 Stark. 302. (3 Eng. C. L. 355.) That his interest in the future fees which he might get if the commission were supported, seems not to have been noticed. *Eden*, 365.

In an action by the assignees of a bankrupt in which the bankruptcy is in dispute, a son of the bankrupt, who was held out as a partner with him, though in fact was not so, is not a competent witness for the plaintiffs.<sup>a</sup>

## SECTION X.

### ACTIONS BY A BANKRUPT.

A bankrupt has a right to property acquired by him subsequent to his bankruptcy, except as against his assignees.

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THOUGH all the rights in respect of property acquired by the bankrupt after his bankruptcy and before he obtains his certificate, are by the assignment vested in his assignees,<sup>b</sup> yet it has been decided in many cases that such property does not vest *absolutely* in the assignees, and that an uncertificated bankrupt has a right to goods acquired by him since his bankruptcy, against all the world but his assignees. Assumpsit by the indorsee against the maker of a promissory note payable to *A.* or his order—\*plea, 1st, non assumpsit; and 2dly, that *A.* became a bankrupt, and that his right to indorse the promissory note became vested in his assignees before the time of the indorsement, whereby the indorsement was void, and created no right in the plaintiffs to sue; replication to the last plea, that the indorsement was made with the consent of the assignees, upon which issue was joined and a verdict found for the defendant; and for the plaintiff on the general issue. Held, that the plaintiff was entitled to judgment upon the whole record. 1st, Because the defendant who had made the note payable to *A.* or his order, was estopped from saying that *A.* was not competent to make an order. 2dly, Because the property acquired by a bankrupt after his bankruptcy does not absolutely vest in his assignees, although they have a right to claim it; and if they do make any claim it is effectual against the bankrupt and all the world, but if they do not interfere, then as between the bankrupt (or any one claiming under him) and his debtor, the latter cannot set up their title, but the bankrupt has a right in a court of law to enforce the payment of his debt.<sup>c</sup>

It has been held that an uncertificated bankrupt may main-

<sup>a</sup> *Holland v. Reeves*, 7 C. & P. 36. Alderson. (32 C. L.)

<sup>b</sup> 6 Geo. IV, c. 16, s. 63, *ante*, 241.

<sup>c</sup> *Drayton v. Dale*, 2 B. & C. 293. (9 Eng. C. L. 91.) *Webb v. Fox*, 7 T. R. 391, shows that a bankrupt may maintain trover for property acquired before his certificate. See also *Ashley v. Kell*, 2 Stra. 1207. *Chippendale v. Tomlinson*, Cooke, 406. *Fowler v. Down*, 1 B. & P. 44. *Coles v. Barrow*, 4 Taunt. 754. The result of all the authorities is, that if the assignees do not interfere under such circumstances, the bankrupt has the same right, as against a third party, as if he had a certificate, but that right is conditional upon the non-interference of the assignees. *Kitchen v. Barch*, 7 East, 53. And the assignees may interfere even after action brought. *Crofton v. Poole*, *infra*.

tain an action for his personal labor performed after the issuing of the fiat.<sup>a</sup> And even where the assignees entered into an express contract to remunerate him for services performed on their behalf, it has been held that he may maintain an action against them on such contract.<sup>b</sup> But where an uncertificated \*bankrupt, being a furniture broker, was employed to remove goods, and for that purpose employed men, procured vehicles, repaired the furniture and supplied materials; held, that as the debt thereby accrued was not in respect of personal labor merely, and as the assignees put in their claim, the bankrupt was not entitled to recover;<sup>c</sup> for he can have no right to property as against his assignees;<sup>d</sup> and on that principle, even where his assignees by agreement, for a valuable consideration paid to them by a third person, had allowed the bankrupt to remain in possession of his furniture, it has been held that they were justified in seizing the furniture afterwards.<sup>e</sup>

\*316

But if the cause of action originated before his bankruptcy, though not completed until afterwards, the bankrupt will not be entitled to sue, even if his assignees do not interfere; as where *A.* was to be paid a commission for introducing a customer to a tradesman, and after the introduction, but before the customer had made a purchase, *A.* became a bankrupt; the assignees brought an action for the commission, which they afterwards discontinued, disclaiming all right to it; held, that the bankrupt was not entitled to sue for it, for though the purchase was not complete until after the bankruptcy, yet the right to the commission referred back to the time that the customer was introduced, which was before the bankruptcy.<sup>f</sup>

Cause of action before bankruptcy.

The bankrupt may bring an action against the assignees, or the commissioners, or the messengers for intermeddling with his property, with a view to contest the validity of the fiat. But if he has availed himself of it in any respect, by taking a benefit under it, as by procuring his discharge from custody on the ground that he had become a bankrupt, and that the petitioning creditor had proved under the commission, he will be estopped from disputing its validity in a court of law.<sup>g</sup> So where the bankrupt sanctioned the sale of his goods under the commission.<sup>h</sup> So where he went round

When the bankrupt may dispute the validity of the commission.

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<sup>a</sup> *Chippendale v. Tomlinson*, 7 East, 57, n. *Cooke*, 428. *Silk v. Osborne*, 1 Esp. 140.

<sup>b</sup> *Coles v. Barrow*, 4 Taunt. 754. "If Mr. Justice Lawrence had continued in the court of common pleas, this decision would probably not have been pronounced. It is not therefore entitled to any great weight. The authority of this case is much broken in upon by *Hesse v. Stephenson*, 3 B. & P. 578." Per Best, J., in *Nias v. Adamson*, 3 B. & Al. 232. (5 Eng. C. L. 267.)

<sup>c</sup> *Crofton v. Poole*, 1 B. & Ad. 568. (20 Eng. C. L. 441.)

<sup>d</sup> *Chambers v. Bernasconi*, 6 Bing. 501. (19 Eng. C. L. 149.)

<sup>e</sup> *Nias v. Adamson*, 3 B. & A. 225. (5 Eng. C. L. 267.)

<sup>f</sup> *Hillary v. Morris*, 5 C. & P. 6. (24 Eng. C. L. 198.)

<sup>g</sup> *Goldie v. Gunston*, 4 Camp. 381. *Watson v. Wace*, 5 B. & C. 153. (11 Eng. C. L. 187.) But see *Mott v. Mills*, 3 C. & P. 197. (14 Eng. C. L. 269.)

<sup>h</sup> *Clarke v. Clarke*, 1 Esp. 61.



to the creditors and solicited their votes in the choice of assignees, and acquiesced in the commission for three years, he was estopped from disputing its validity.<sup>a</sup> But if the bankrupt has not derived any benefit from the fiat, or if his conduct does not imply a consent to the proceedings under it, so that the party to the suit has been thereby induced to alter his condition, he will not be estopped from contesting its validity. As where the bankrupt had assisted the assignees, by giving directions as to the sale of the goods, and after issuing the commission he gave notice to the lessors of a farm which he held, that he had become bankrupt, and that he was willing to give up the farm, and in consequence thereof the lessors received the lease, and accepted possession of the premises; held, 1st, that the interference of the bankrupt in the sale was referable to an intention on his part to take care of his property, and to see that the most was made of it, and that it did not amount to a consent to the sale, and therefore he was not estopped on that ground from bringing an action of trover against the *assignees*; 2dly, that he was not estopped by the act of his having given up his lease to the *lessors*, the assignees not being parties or privies to that transaction; as estoppels bind parties and privies only, not strangers; though he might be estopped from disputing the commission as against the lessors.<sup>b</sup>

## SECTION XI.

### ACTIONS AGAINST BANKRUPTS.

Bankrupt  
discharg-  
ed by cer-  
tificate.

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Certificate  
exempts  
him from  
arrest.

By the 6 Geo. IV, c. 16, s. 121, it is enacted, that every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby made provable under the commission, in case he shall obtain a \*certificate of such conformity, so signed and allowed, and subject to such provisions as hereinafter directed; but no such certificate shall release or discharge any person who was partner with such bankrupt at the time of his bankruptcy, or who was then jointly bound, or had made any joint contract with such bankrupt.

By s. 126, any bankrupt who shall, after his certificate shall have been allowed, be arrested, or have any action brought against him for any debt, claim, or demand hereby made proveable under the commission against such bankrupt, shall be dis-

<sup>a</sup> Like *v. Howe*, 6 Esp. 20.

<sup>b</sup> *Heane v. Rogers*, 9 B. & C. 577. (17 Eng. C. L. 449.)

charged upon common bail, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence, and such bankrupt's certificate, and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate; and if any such bankrupt shall be taken in execution, or detained in prison for such debt, claim, or demand, where judgment has been obtained before the allowance of his certificate, it shall be lawful for any judge of the court wherein judgment has been so obtained, on such bankrupt's producing his certificate, to order any officer who shall have such bankrupt in custody by virtue of such execution, to discharge such bankrupt without exacting any fee, and such officer shall be hereby indemnified for so doing.

Is evidence of the proceedings under the fiat.

By s. 127, if any person who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by any insolvent act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce (after all such charges) sufficient to pay every creditor under the commission fifteen shillings in the pound, such certificate shall only protect his person from arrest and imprisonment, but his future estate and effects (except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife, and children) shall vest in the assignees under the said commission, who shall be entitled to seize the same in like manner as they might have seized property of which such a bankrupt was possessed at the issuing the commission.

When future assets shall be liable, notwithstanding certificate.

It appears from the preceding enactments, that in actions \*against the bankrupt for any cause of action barred by the certificate, he may plead in general that the cause of action accrued before he became bankrupt, and the certificate shall be sufficient evidence of all the proceedings antecedent to the obtaining thereof.

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The certificate cannot be given in evidence under the general issue.<sup>a</sup> This general plea of bankruptcy can be pleaded only in cases where the bankruptcy happened before the commencement of the action, though it need not be so averred; it is sufficient if every word required by the statute is found in the plea.<sup>b</sup> The plea should pursue the words of the statute, and conclude to the country;<sup>c</sup> under such a plea, the certificate

How a certificate must be pleaded.

<sup>a</sup> *Gowland v. Warren*, 1 Camp. 363.

<sup>b</sup> *Tower v. Cameron*, 6 East, 413.

<sup>c</sup> *Sheen v. Garratt*, 6 Bing. 686. (19 Eng. C. L. 205.) 4 M. & P. 525. Where the plea stated that a commission of bankruptcy issued against the plaintiff, under which he was duly declared and adjudged to "be a bankrupt," without alleging that he was in fact a bankrupt, it was held bad; it should state the trading, the act of bankruptcy, and the petitioning creditor's debt. *Gwinnis v. Carroll*, 2 M. & R. 132. (17 C. L. 296.)

may be given in evidence if obtained at any time previously, even though it be not obtained until after the action was commenced.<sup>a</sup> If the bankrupt does not obtain his certificate until after plea pleaded, he should plead it specially *puis darrien continuance*; if he neglects to do so, and judgment is obtained against him, he cannot plead his certificate to an action on such judgment.<sup>b</sup>

Replica-  
tion.

To the general plea of bankruptcy, the plaintiff can only reply the *similiter*,<sup>c</sup> under which he may give in evidence any matter which can avoid the certificate. There is not any case in which a special replication has been held good.<sup>d</sup>

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\*The plaintiff, in answer to a general plea of bankruptcy, may give in evidence a subsequent promise made by the bankrupt to pay the debt.<sup>e</sup>

A promise  
to pay a  
debt dis-  
charged  
by a certi-  
ficate, to  
be valid  
must be in  
writing.

By 6 Geo. IV, c. 16, s. 131, it is enacted, that no bankrupt after his certificate shall have been allowed under any present or future commission, shall be liable to pay or satisfy any debt, claim, or demand, from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise, or agreement, made or to be made after the suing out of the commission, unless such promise, contract, or agreement be made in writing, signed by the bankrupt, or by some person thereto lawfully authorised in writing by such bankrupt.

It has been held that a letter containing a promise to pay the debt, and signed by the initial of the bankrupt's surname only, was not sufficient under this provision.<sup>f</sup> It must be a promise to pay—a promise to deliver goods in satisfaction of the debt, has been held to be insufficient.<sup>g</sup> Where the bankrupt wrote to the creditor, saying, “by the end of next month I shall have my banker's account, and I shall remit the sum due to you in a draft on them,” held sufficient.<sup>h</sup>

<sup>a</sup> Harris v. James, 9 East, 82.

<sup>b</sup> Todd v. Maxfield, 6 B. & C. 105. (13 Eng. C. L. 110.) 9 D. & R. 171. A certificate pending a suit operates as a release. Anon. Loft. 437.

<sup>c</sup> Wilson v. Kemp, 2 M. & S. 549.

<sup>d</sup> Per Bayley, J., in Hughes v. Morley, 1 B. & A. 27. A defendant who had obtained his certificate as a bankrupt after the action was brought, was held entitled to be discharged out of custody, though the fiat issued before the action was commenced, and the defendant had pleaded, not setting up his bankruptcy, and given a cognovit conditioned for payment at a later period than judgment would have been obtained in the regular way. Osborne v. Williamson, 1 M. & W. 550. The production of an enrolment of the certificate in the court of Chancery is not sufficient without an affidavit verifying the enrolment. But see Jacobs v. Phillips, 1 C. M. & R. 195.

<sup>e</sup> Williams v. Dyde, Peake, 68. Trueman v. Fenton, Cowp. 544. Penn v. Bennett, 4 Campb. 205. Blackbourne v. Ogle, 8 Price, 52. Brix v. Braham, 1 Bing. 281. (8 Eng. C. L. 324.)

<sup>f</sup> Hubert v. Moreau, 2 C. & P. 528. (12 Eng. C. L. 248.) 12 Moore, 216. (22 Eng. C. L. 450.)

<sup>g</sup> Tattle v. Grimwood, 11 Moore, 432. 3 Bing. 493. (13 Eng. C. L. 62.)

<sup>h</sup> Lang v. Mackenzie, 4 C. & P. 463. (19 Eng. C. L. 474.)

## SECTION XII.

## OF THE EFFECT OF A CERTIFICATE.

A CERTIFICATE will operate as a discharge from all debts due by the bankrupt before his bankruptcy, and also from all claims and demands proveable under the fiat.\* But it does not affect \*debts due to the crown, for the crown is not bound by the bankrupt laws.<sup>b</sup> \*321

With respect to debts not payable at the time of the bankruptcy, it is enacted by the 6 Geo. IV, c. 16, s. 51, that any person who shall have given credit to the bankrupt upon valuable consideration, for any money or other matter or thing whatsoever, which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note, or other negotiable security or not, shall be entitled to prove such debt, bill, bond, note, or other security, as if the same was payable presently, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest for what he shall so receive, at the rate of five per cent., to be computed from the declaration of a dividend to the time such debt would have become payable according to the terms upon which it was contracted. Debts not payable at the time of the bankruptcy may be proved.

By s. 52, any person who at the issuing the commission shall be a surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff or to the action, if he shall have paid the debt, or any part thereof in discharge of the whole debt, (although he may have paid the same after the commission issued,) if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the said commission which such creditor possessed or would be entitled to in respect of such proof; or if the creditor shall not have proved under the commission, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the commission, not disturbing the Sureties may prove under the fiat after having paid the debts.

\* 6 G. IV, c. 16, s. 121, *ante*, 317. *Bamford v. Burrell*, 2 B. & P. 1. Where the goods of a certificated bankrupt were seized under a *fi. fa.* issued on a judgment in respect of a debt due before the bankruptcy, the court on motion set aside the *fi. fa.*, observing, that the bankrupt was discharged not only from the debt, but from all remedies for the recovery of the debt. *Davis v. Shapley*, 1 B. & Ad. 54. (20 Eng. C. L. 344.) In *Hanson v. Blakey*, 4 Bing. 493, (15 Eng. C. L. 54,) the court intimated an opinion that the legislature intended to afford relief to the person of the bankrupt only, not to his property. But in that case the goods belonged to the assignees and not to the bankrupt, which distinguishes it from *Davis v. Shapley*.

<sup>b</sup> Anon. 1 Atkins, 262. No certificate shall release or discharge any person who was a partner with the bankrupt; nor does it release the estate of a deceased partner. Arch. 263.

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former dividends, and may receive dividends with the other creditors, although he may have become surety liable or bail as aforesaid, after an act \*of bankruptcy committed by such bankrupt; provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed.

When obligee in bottomry bond may prove.

Persons effecting insurance.

By s. 53, the obligee in any bottomry or respondentia bond, and the assured in any policy of insurance made upon good and valuable consideration, shall be admitted to claim, and after the loss or contingency shall have happened, to prove his debt or demand in respect thereof, and receive dividends with the other creditors as if the loss or contingency had happened before the issuing the commission against such obligor or insurer; and that the person effecting any policy of insurance upon ships or goods with any person, as a subscriber or underwriter, becoming bankrupt shall be entitled to prove any loss to which such bankrupt shall be liable in respect of such subscription, although the person so effecting such policy was not beneficially interested in such ships or goods, in case the person or persons so interested is not or are not within the united realm.

Annuity creditor.

By s. 54, any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the commission.

Sureties for payment of annuities granted by bankrupt, in what manner to come in under the commission.

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By s. 55, it shall not be lawful for any person entitled to any annuity granted by any bankrupt, to sue any person who may be collateral surety for the payment of such annuity, until such annuitant shall have proved under the commission against such bankrupt for the value of such annuity, and for the "payment" thereof; and if such surety after such proof pay the amount proved as aforesaid, he shall be thereby discharged from all claims in respect of such annuity; and if such surety shall not (before any payment of the said annuity subsequent to the bankruptcy shall have become due) pay the sum so proved as aforesaid, he may be sued for the accruing payments of such annuity, until such annuitant shall have paid or satisfied the amount so proved, with interest thereon at the rate of four per cent. per annum, from the time of the notice of such proof, and of the amount thereof being given to such surety; and after such payment or satisfaction, such surety shall stand in the place of such annuitant in respect of such proof as aforesaid, to the amount so paid or satisfied as aforesaid by such surety; and the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant, or of such surety in respect

of such annuity; provided that such surety shall be entitled to credit in account with such annuitant for any dividends received by such annuitant under the commission, before such surety shall have fully paid or satisfied the amount so proved as aforesaid.

By s. 56, if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividend with the other creditors, not disturbing any former dividends, provided such persons had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed.

Contingent debts are provable after the happening of the contingency.

By s. 57, in all future commissions against any person or persons liable upon any bill of exchange or promissory note, whereupon interest is not reserved, overdue at the issuing the commission, the holder of such bill of exchange or promissory note shall be entitled to prove for interest upon the same, to be calculated by the commissioners to the date of the commission, at such rate as is allowed by the court of King's Bench in actions upon such bills or notes.

Interest on bills and notes.

By s. 58, if any plaintiff in any action at law or suit in equity, or petitioner in bankruptcy or lunacy, shall have obtained any judgment, decree, or order against any person who shall thereafter \*become bankrupt for any debt or demand in respect of which such plaintiff or petitioner shall prove under the commission, such plaintiff or petitioner shall also be entitled to prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the \*bankruptcy."

Plaintiff obtaining judgment may prove for costs. \*324

By s. 62, it is enacted, that in all commissions against one or more of the partners of a firm, any creditor to whom the bankrupt or bankrupts, is or are indebted, jointly with the other partner or partners of the said firm, or any of them, shall be entitled to prove his debt under such commission for the purpose only of voting in the choice of assignees under such commission, or of assenting to or dissenting from the certificate of such bankrupt or bankrupts, or of either of such purposes; but such creditor shall not receive any dividend out of the separate estate of the bankrupt or bankrupts until all the separate creditors shall have received the full amount of their respective debts, unless such creditor shall be a petitioning creditor in a commission against one member of a firm.

Joint creditor may prove under the fiat

When entitled to a dividend.



When certificate bars a debt which cannot be proved under the commission.

But though all debts proveable under fiat are discharged by the certificate, yet the converse does not obtain; for there are some debts discharged by the certificate which cannot be proved under the fiat, as where a creditor commenced an action for debt, against a trader who afterwards became a bankrupt, and the creditor proceeded with the action to judgment, after which the bankrupt obtained his certificate; and brought a writ of error which was non prossed, and the costs of non pros in error awarded against him; held, that there costs were referable to the original debt, and that they were discharged by the certificate, though they could not be proved under the fiat.<sup>a</sup>

Where an action had been commenced against a bankrupt, after a fiat had been sued out, and he gave a cognovit for the debt and costs, after which he obtained his certificate; held, that he was entitled to be discharged out of custody, on a judgment signed on the cognovit; for the cognovit did not create a new debt, and the cause of action arose before the bankruptcy.<sup>b</sup>

Costs incurred after bankruptcy.

\*325 With regard to the effect of a certificate, in respect of costs incurred subsequently to an act of bankruptcy, there are conflicting decisions; but the correct principle appears to be, that where in an action for a debt or liquidated damages, judgment is not entered up until after the fiat is issued; the debt itself is proveable under the fiat, because it existed before the bankruptcy, and might have been proved under the fiat, independently of the bankruptcy; but the costs are not proveable because they do not constitute a debt until after judgment; yet they are discharged by the certificate, because they are accessory to the debt, and when the right to the principal is barred, the right to the accessory is barred also.<sup>c</sup> But where the plaintiff is nonsuited, or has a verdict against him, and a fiat is sued out against him before judgment is entered up, the costs cannot be proved under the fiat for the reason above stated, but they are not discharged by the certificate, because there is no prior debt to which they can be attached.<sup>d</sup>

Where, by an order of Nisi Prius, a cause and all matters of difference were referred to an arbitrator, and the costs in the cause were to abide the event, and he found that the plaintiff was indebted to the defendant, and ordered that he should pay the defendant's costs; after the order of reference was made, but before the costs were taxed or judgment of nonsuit was en-

<sup>a</sup> Scott v. Ambrose, 3 M. & S. 326. Phillips v. Brown, 6 T. R. 282. *Ex parte Hill*, 1 Ves. 646.

<sup>b</sup> Osborne v. Williamson, 1 Mees. & Wels. 550. 2 Gale, 126.

<sup>c</sup> Scott v. Ambrose, *supra*. Willet v. Pringle, 2 N. R. 190, *et in notis*. *Ex parte Hill*, 11 Ves. 646. *Ex parte Poucher*, 1 G. & J. 386. Phillips v. Brown, *ante*, 324. Lewis v. Piercy, 1 H. Bl. 29. Blanford v. Foot, Cowp. 128.

<sup>d</sup> Walker v. Barnes, 5 Taunt. 778. (1 Eng. C. L. 262.) Haswell v. Thorogood, 7 B. & C. 705. (14 Eng. C. L. 3.) See Brough v. Adcock, 7 Bing. 650. (20 Eng. C. L. 274.) Bire v. Moreau, 4 Bing. 57. (13 Eng. C. L. 341.) 12 Moore, 226.

tered, the plaintiff became a bankrupt; held, on a motion for an attachment for non-payment of the costs, after the bankrupt had obtained his certificate, that the costs were not proveable under the fiat, or discharged by the certificate. Lord Tenterden, C. J: "It has been decided by the case of *Walker v. Barnes*,<sup>a</sup> that where the defendant obtains a verdict, and the plaintiff becomes a bankrupt before judgment is signed, the costs cannot be proved under the commission, on the principle that no debt arises in such case until judgment is signed. Now here the plaintiff became bankrupt after the nonsuit, but before judgment was signed. The costs in the cause did not constitute any debt until judgment was signed; for there is no distinction in this respect, between a cause where the defendant obtains a verdict, and one where the plaintiff is nonsuited. The verdict or nonsuit only entitles the defendant to tax his costs, \*but no debt arises, and no action can be maintained for them until judgment is signed. If the amount of the costs could not be proved under the commission, the plaintiff was liable to pay them.<sup>b</sup>"

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Where an action was referred to an arbitrator, and the defendant paid a sum awarded against him, but not the costs of the cause, as they had not been taxed; a fiat then issued against him, after which the plaintiff taxed his costs; held, 1st, that those costs were proveable under the fiat; secondly, that the defendant having paid them to the sheriff on an attachment before he obtained his certificate, the court would order them to be repaid to him afterwards, the sheriff having still the amount in his hands.<sup>c</sup> So it has been held, that interlocutory costs payable under an order of *Nisi Prius* by a defendant, and taxed *previous* to his bankruptcy, are proveable under the fiat.<sup>d</sup>

Where the plaintiff obtained a verdict in an action of assumpsit after the defendant had committed an act of bankruptcy, and the subsequent term commenced on the 7th of June, on the 15th of which month a commission of bankrupt was issued, and on the 18th judgment was signed as of the term; held, that the debt was proveable under the commission, and that the certificate operated as a discharge from it.<sup>e</sup> So where the plaintiff in an action of trespass obtained a verdict, and entered up judgment after the defendant had committed an act of bank-

What judgments are proveable under the commission.

<sup>a</sup> 5 Taunt. 778. (1 Eng. C. L. 262.)

<sup>b</sup> Haswell v. Thorogood, 7 B. & C. 705. (14 Eng. C. L. 3.)

<sup>c</sup> Bishop v. Leigh, 1 Harr. & Woll. 664.

<sup>d</sup> Jacob v. Phillips, 1 C. M. & R. 195.

<sup>e</sup> *Ex parte Birch*, 4 B. & C. 880. (10 Eng. C. L. 464.) This decision, proceeded on the ground that the judgment had relation to the first day of the term, and therefore might be considered as having been entered up before commission issued. See *Greenway v. Fisher*, 7 B. & C. 436, (14 Eng. C. L. 75,) S. P., but there it was a *scire facias* on a judgment in trover. Bayley, J., said, that judgment for damages in an action of trover, cannot be distinguished from a judgment in an action of assumpsit to recover unliquidated damages. This case was like *ex parte Birch*.

ruptcy, but before the commission was sued out; held, that the debt and costs were proveable under the commission, and therefore discharged by the certificate. The court said, that the judgment even in an action of *tort* was a debt contracted. That the words "*bond fide*" in the statute (then 48 Geo. III, c. 135, s. 2, "but now 6 Geo. IV, c. 16, s. 47) appeared to be used in opposition to debts contracted by collusion; and it seemed to have been the object of the legislature to prevent all discussion as to whether a fair debt of any description was contracted before or after the bankruptcy.<sup>a</sup>

The preceding decisions were founded on the principle that a judgment under such circumstances was a debt *bond fide* contracted and consequently within the meaning of the words, "that every person with whom any bankrupt shall have really and *bond fide* contracted any debt or demand before the issuing the commission against him, shall, notwithstanding any prior act of bankruptcy, be admitted to prove the same under the commission."<sup>b</sup> Where the plaintiff obtained a verdict in an action of seduction, after which the defendant became a bankrupt, and obtained his certificate before the plaintiff entered up judgment; held, that the debt was not discharged by the certificate.<sup>c</sup>

**Claims** Claims sounding in unliquidated damages, the amount of  
**sounding** which cannot be ascertained by computation, or without the  
**in unliqui-** intervention of a jury, are not proveable under the fiat, and  
**-dated da-** consequently are not barred by a certificate. Therefore bank-  
**mages are** ruptcy is no bar to an action of trover, though the conversion  
**not barred** happened before the bankruptcy, and the plaintiff has his elec-  
**by certifi-** tion to bring assumpsit or trover.<sup>d</sup> Nor to an action on a  
**cate.** breach of covenant, where the damages to be recovered are un-  
certain.<sup>e</sup> Nor to an action of tort against a broker for selling  
out plaintiff's stock contrary to his orders.<sup>f</sup> Nor to an action  
of trespass for mesne profits.<sup>g</sup> Nor to an action of covenant

\*328 \*for non-payment of rent accruing subsequent to his bankruptcy.<sup>h</sup>

**Liabilities** In assumpsit on a promise to pay a certain sum weekly for  
**on account** the support of an illegitimate child which the plaintiff had by  
**of illegiti-** the defendant upon a plea of certificate, it was held, that the  
**-mate chil-** defendant was liable for the arrears which had accrued since  
**-dren.**

<sup>a</sup> Robinson v. Vale, 2 B. & C. 762. (9 Eng. C. L. 236.)

<sup>b</sup> 6 Geo. IV, c. 16, s. 47. According to the principle established by these cases, the debt in *ex parte* Charles, 14 East, 197, *ante*, 237, was proveable under the commission, for judgment was signed before the commission was issued; and it is immaterial that the action was for tort, or for unliquidated damages; still they do not militate against that case, for it only decides that a debt founded on a judgment which was not entered up until after the act of bankruptcy, was not a *good petitioning creditor's debt*, as such a debt ought to be in existence at the time of the bankruptcy.

<sup>c</sup> Brigs v. Gilbert, 2 M. & S. 70.

<sup>d</sup> Parker v. Norton, 6 T. R. 695.

<sup>e</sup> Bannister v. Scott, *id.* 489. Hammond v. Toulmin, 7 T. R. 612.

<sup>f</sup> Parker v. Crole, 5 Bing. 63. (15 Eng. C. L. 371.)

<sup>g</sup> Goodtitle v. North, Doug. 563.

<sup>h</sup> Auriol v. Mills, 4 T. R. 94. But see *ante*, 244.

the bankruptcy.<sup>a</sup> A bond to indemnify the parish against the maintenance of a bastard, is not proveable under the commission, and therefore the obligee is not discharged by his certificate from expenses incurred subsequent to his bankruptcy.<sup>b</sup>

A commission of bankrupt does not operate as a dissolution of the contract of hiring between a bankrupt and his servant. <sup>a clerk.</sup> Therefore, where a clerk, being hired for a year, continued in the bankrupt's office after the bankruptcy until the middle of the year, when by mutual consent, the contract was dissolved; it was held, in an action by the clerk against the bankrupt for his salary, that the certificate was no bar, and that the plaintiff was entitled to recover for all that part of the year during which he acted as clerk; for though sec. 48 of 6 Geo. IV, c. 16, provides that the servants of a bankrupt shall receive out of the estate, the wages due at the time of the commission, not exceeding six months, yet it has made no alteration in the legal effect of the contract of hiring, and as the wages *had not been due* either by efflux of time or by dissolution of the contract at the time of the commission, that provision did not interfere with the plaintiff's claim.<sup>c</sup>

Where the defendant covenanted, as surety for one S., for the due payment of an annuity, and that S. should complete the building of certain houses to secure the annuity; held, that a claim for instalments of the annuity which became due after the bankruptcy of the defendant, was not barred by his certificate. 2dly, That a breach assigning that the houses were not finished by S., was a claim for general and unliquidated damages not \*proveable under the bankruptcy of the surety, and therefore not barred by his certificate.<sup>d</sup>

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But where A. and B. entered into a bond jointly and severally (the latter as being surety for the former,) in March, 1832, conditioned for the payment of 5*l.* interest on the 1st of March, 1833, and on the first of March, 1834, and for the payment of 205*l.*, being principal and interest, on the 1st of March 1835; and the first 5*l.* was not paid until the 30th of March, 1833, and in June, 1833, B. became a bankrupt; held, that the bond was forfeited in March, by the non-payment of the 5*l.* on the 1st of that month; that the legal effect of the forfeiture was not waived by the subsequent acceptance of interest by the obligees on the 30th, consequently, that the debt was proveable under the commission of B., and that his certificate was a bar to an action on the bond by the assignees.<sup>e</sup>

Every person who has made himself legally liable for the payment of the debt of another, is a surety within the meaning of

Who is a  
surety.

<sup>a</sup> Millen v. Whittenbury, 1 Camp. 428.

<sup>b</sup> Overseers of St. Martin's, &c., v. Warren, 1 B. & A. 491.

<sup>c</sup> Thomas v. Williams, 1 Ad. & Ell. 685. (28 Eng. C. L. 180.) 3 N. & M. 545.

<sup>d</sup> Thompson v. Thompson, 1 Hodges, 225. 2 Bing. N. C. 168. (29 Eng. C. L. 297.)

<sup>e</sup> The Skinners' Company v. Jones, 3 Bing. N. C. 481. (32 C. L.)

this act.<sup>a</sup> If a man accept or draw, or indorse a promissory note or bill of exchange for the accommodation of a trader who becomes a bankrupt before payment, he is a surety within the act.<sup>b</sup> But the drawer of a bill payable to his own order, but drawn by him for the accommodation of the first indorser, is not "surety for or liable for the debt" of that indorser.<sup>c</sup> A man who joined a trader in a bond to the crown, the condition of which was, that the trader as sub-distributor of stamps, should well and truly account, &c., to the commissioners of stamps, &c., was held, to be a surety, and the trader having become a bankrupt, it was holden that a sum of money paid to the crown by the surety, in consequence of the trader not having duly accounted, was discharged by the certificate.<sup>d</sup>

What  
claims of  
a surety  
are barred  
by the cer-  
tificate.

\*330

The certificate is a bar, not only to any action at the suit of the surety for the recovery of the money paid in discharge of the original debt, but to any action for the consequential \*damages accruing from the non-payment by the bankrupt of the original debt when due; and therefore when the acceptor of an accommodation bill brought an action against the drawer who had become bankrupt, for not providing him with funds to pay the bill when due, whereby he had incurred the costs in an action and sustained considerable damage; held, that the certificate was a good bar, for where the right to the principal debt is barred by the statute, the right to damages, which are accessory to and consequential on that principal debt is also barred; the accessory cannot, in point of law be severed from the principal.<sup>e</sup>

Where *A.* became surety for *B.* for a debt to *C.*, and after a commission of bankruptcy issued against *B.*, *A.* paid part of the debt to *C.* under an agreement that it should *be in discharge of his personal liability as surety.* *C.* proved under the commission. Held, that *B.*'s certificate was no bar to an action against him by *A.* for the sum which he paid *C.*; for the statute only applies to cases where a surety has paid the whole debt or a part in discharge of the whole. In those cases the creditor has no further claim under the commission, and the surety is then placed in the creditor's original situation with respect to the bankrupt. Here the creditor having proved under the commission, and the surety having released himself from personal responsibility could not derive any benefit under the commission, and the legislature could not have intended, under such circumstances to take away the right of action which he possessed.<sup>f</sup>

<sup>a</sup> *Ex parte Yonge*, 2 Rose, 40. 3 V. & B. 31.

<sup>b</sup> Arch. 116. *Bassett v. Dodgin*, 9 Bing. 653. (23 Eng. C. L. 409.) 2 M. & Scott, 777. See 6 Geo. IV, c. 16, s. 52, *ante*, 321.

<sup>c</sup> *Mayer v. Meakin*, Gow. 183.

<sup>d</sup> *Westcott v. Hodges*, 5 B. & A. 12. (7 Eng. C. L. 7.)

<sup>e</sup> *Van Sandau v. Crosbie*, 3 B. & A. 13. (5 Eng. C. L. 219.)

<sup>f</sup> *Ten v. Soutten*, 5 B. & A. 852. (7 Eng. C. L. 280.)



The statute does not apply to co-sureties so as to fix the liability of one co-surety for another, on default made by the principal. Where *A.* borrowed a sum of money on a bond, by which he and four others bound themselves for the payment of interest and for the discharge of the principal at the expiration of five years, or if sooner called upon, then at twenty-one days after demand: One of the two co-obligors became bankrupt, and obtained his certificate; afterwards the co-obligors, who continued solvent, were obliged to pay the amount of the bond \*and one of them having brought an action for contribution against the party who had been bankrupt; held, that the certificate was no bar to the action, for the plaintiff's liability depended on two contingencies; first, whether *A.*, the original debtor, would pay; and secondly, whether in his default, the co-sureties would be called upon; no direct liability arose till after the bankruptcy, and then there was not such a liability of the bankrupt, to his co-surety, as could have been proved under the commission. The co-sureties were not so for each other, but for the principal.\*

The claim of a co-surety for contribution is not barred by the certificate.

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A certificate obtained in a foreign country will be a bar to an action in this country for a debt contracted in such country; but not to an action for a debt contracted here.\* And where a bill of exchange was drawn in Ireland, and accepted and paid in England, it was held to be a debt contracted in England, and therefore that the certificate of the drawer obtained in Ireland, was no bar to an action brought against him in England by the acceptor. The court said, that a certificate obtained in Ireland since the union, could have no greater operation than a certificate under a Scottish sequestration, which was never thought to discharge a debt contracted in England.<sup>d</sup>

Foreign certificate.

By 6 Geo. IV, c. 16, s. 130, it is enacted, that no bankrupt shall be entitled to his certificate, or to be paid any such allowance, and that any certificate, if obtained, shall be void, if such bankrupt shall have lost, by any sort of gaming or wagering, in one day twenty pounds, or within one year next preceding his bankruptcy two hundred pounds; or if he shall, within one year next preceding his bankruptcy, have lost two hundred pounds by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not \*actually transferred or delivered in pursuance of such contract; or shall, after an act of bankruptcy committed or in contemplation of bankruptcy, have destroyed, altered, mutilated, or falsified, or caused to be destroyed, altered, mutilated, or falsified, any of his books, papers, writings, or

What will avoid a certificate.

Gaming.

Stock jobbing.

\*332

Destroying books or making false entries.

\* *Clements v. Langley*, 5 B. & Ad. 372. (27 Eng. C. L. 97.) See *ex parte Porter*, 3 Mont. & Ayr. 281.

<sup>b</sup> *Potter v. Brown*, 5 East, 124. *Ballantine v. Goulding, Cooke*, 487.

<sup>c</sup> *Smith v. Buchannan*, 1 East, 6. *Quin v. Keepe*, 2 H. Bl. 583.

<sup>d</sup> *Lewis v. Owen*, 4 B. & A. 654. (6 Eng. C. L. 555.)



Conceal-  
ing prop-  
erty.  
Allowing  
proof of  
false debt.

securities, or made or been privy to the making of any false or fraudulent entries in any book of account or other document, with intent to defraud his creditors, or shall have concealed property to the value of ten pounds or upwards; or if any person having proved a false debt under the commission, such bankrupt being privy thereto or afterwards knowing the same, shall not have disclosed the same to his assignees within one month after such knowledge.

It has been held, that where a bankrupt lost 20*l.* in one day at gaming, his certificate was thereby invalidated, though on the same occasion he won more than he lost.<sup>a</sup>

If a credit-  
or be in-  
duced by a  
reward to  
sign or as-  
sent to a  
certificate,  
it will  
avoid it.

If any one of the bankrupt's creditors, though without the knowledge or privity of the bankrupt, be induced by money to sign the certificate, it is void; as being a fraud on the rest of the creditors, who may have been induced to sign by his example.<sup>b</sup> But if there were creditors enough to sign the certificate, and an enemy of the bankrupt were to give money to one of the creditors to induce him to sign it, for the purpose of preventing the bankrupt from deriving any benefit from the certificate, it would be a fraud on the bankrupt and should not hurt him.<sup>c</sup> Where the fourth among several other signatures had been obtained by the promise of the bankrupt to pay the creditor the whole of his debt, the certificate was void, though the creditors who signed before and after the fourth were sufficient, without reckoning that one.<sup>d</sup> If a creditor be induced, for money, to withdraw a petition against the allowance of a certificate, or if he sell his debt and agree at the same time to withdraw his petition, it will avoid the certificate.<sup>e</sup>

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## \*SECTION XIII.

## SECOND BANKRUPTCY.

In case of  
a second  
bankrupt-  
cy, future  
effects  
will vest  
in as-  
signees,  
unless the

By 6 Geo. IV, c. 16, s. 127, it is enacted, that if any person who shall have been so discharged by such certificate as aforesaid or who shall have compounded with his creditors, or who shall have been discharged by any insolvent act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission fifteen shillings in the pound, such certificate shall

<sup>a</sup> *Ex parte* Newman, 9 G. & J. 329.

<sup>b</sup> *Holland v. Palmer*, 1 B. & P. 95. *Ex parte* Hall, 17 Ves. 62. *Ex parte* Harrison, 4 Mont. 36. *Robson v. Calze*, Doug. 228.

<sup>c</sup> Per Lord Mansfield, *id.*

<sup>d</sup> *Phillips v. Dica*, 15 East, 248.

<sup>e</sup> *Ex parte* Gibson, 6 Ves. 5. *Cooke*, 469. *Arch.* 260.

only protect his person from arrest and imprisonment, but his future estate and effects (except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife and children) shall vest in the assignees under the said commission, who shall be entitled to seize the same in like manner as they might have seized property of which such a bankrupt was possessed at the issuing the commission.

bankrupt  
has paid  
15s. in the  
pound.

This section is retrospective, and applies to cases where the first certificate was granted under a commission issued before the passing of the act, but not to cases where the second certificate had been previously obtained.<sup>a</sup>

All debts proveable under the second commission are barred by the certificate. Where a commission of bankrupt was issued against a trader in 1823, under which he obtained his certificate, and a second commission was issued against him in 1826, under which he also obtained a certificate, but he did not pay 15s. in the pound; held, in an action by a creditor for the amount of bills of exchange which he might have proved under the second commission, that the certificate was a good bar, for by the above section, the future effects of the bankrupt are vested in his assignees, who are to distribute them rateably among the creditors; and the plaintiff might have claimed his part in such distribution. If the certificate were no bar, and the plaintiff was to have execution against the goods, it would, \*in effect, be an execution against the goods of the assignees, and he would have the benefit of a full payment of his debt, instead of the property being fairly shared among the creditors.<sup>b</sup> Where the bankrupt has not paid 15s. in the pound, under the second commission, his certificate will not avail him even when it has been signed by the creditor who sues him;<sup>c</sup> or though the first commission was superseded by consent;<sup>d</sup> or although all the former creditors did not come in under the deed of composition, which embraced, in its terms, *all the creditors*.<sup>e</sup> But a composition which is limited to a particular description of creditors only, such as joint creditors, will not avoid the effect of a certificate under a subsequent fiat, for the act contemplated only such general compositions as would admit all creditors of whatever description.<sup>f</sup> Nor will a composition, where the bankrupt has paid all his creditors the full amount of their debts.<sup>g</sup>

Debts  
proveable  
under the  
second  
commis-  
sion are  
barred by  
the certi-  
ficate,  
though  
15s. in the  
pound be  
not paid.

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A second commission issued against a trader before a former Second commission is disposed of, is a nullity; therefore where a bank- commis-

<sup>a</sup> Carew v. Edwards, 4 B. & Ad. 351. (24 Eng. C. L. 71.) Robertson v. Score, *infra*. See Elston v. Braddick, 2 C. & M. 435. 4 Tyr. 122, S. P.; where it was held, that the assignees might recover by action, money deposited in a bank by the bankrupt, after his second certificate, not having paid 15s. in the pound.

<sup>b</sup> Robertson v. Score, 3 B. & Ad. 338. (23 Eng. C. L. 89.) Eicke v. Nokes, M. & M. 303. (22 Eng. C. L. 314.)

<sup>c</sup> Philpott v. Corden, 5 T. R. 287.

<sup>d</sup> Thornton v. Dallas, Doug. 46.

<sup>e</sup> Slaughter v. Cheyne, 1 M. & S. 182.

<sup>f</sup> Norton v. Shakespeare, 15 East, 619.

<sup>g</sup> Read v. Sowerby, 3 M. & S. 78.

rupt obtained his certificate under a second commission, issued under such circumstances, the court held that he was not entitled to be discharged out of custody, though the debt for which he was detained was contracted before the issuing of that commission.<sup>a</sup> So, where a third commission was issued against a bankrupt, who had not paid any dividend under the first and second commission; held, that it was a nullity, for the consideration of the bankrupt's discharge from his debts is the giving up all that he has to his creditors. The bankrupt in a case like the present has nothing to give up; and by contracting debts, he in some sort committed a fraud upon every creditor who trusted him.<sup>b</sup>

Third  
commis-  
sion.

It is incumbent on the defendant affirmatively to prove that he has paid 15s. in the pound under the second commission.<sup>c</sup> Evidence that his estate will *probably* pay so much is insufficient.<sup>d</sup>

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<sup>a</sup> Till v. Wilson, 7 B. & C. 664. (14 Eng. C. L. 110.) 1 M. & R. 580.

<sup>b</sup> Fowler v. Coster, 10 B. & C. 427. (21 Eng. C. L. 104.) Where all the cases on this subject are considered. But see Todd v. Maxfield, 3 B. & C. 222. (10 Eng. C. L. 56.)

<sup>c</sup> Gregory v. Merton, 3 Esp. 195.

<sup>d</sup> Coverly v. Morley, 16 East, 225.

\*CHAPTER IV.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

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SECTION I.

DEFINITION OF A BILL OF EXCHANGE, PROMISSORY NOTE, ETC.

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1.—*Of a bill of exchange.*] A BILL of exchange is a written order from *A.* to *B.* directing *B.* to pay *C.* or bearer, or *C.* or order, a sum of money therein specified. *A.* is called the drawer *B.* the drawee, and *C.* the payee. When *C.*, the drawee, has undertaken to pay the bill he is called the acceptor. If the drawee refuses to accept it, it is not unusual for a stranger to accept it, for the honor of the drawer; the stranger so accepting it, is called the *acceptor supra protest*. Bills of exchange are either foreign or inland. \*Foreign bills are such as are drawn in England and made payable abroad; so *vice versa*. Bills drawn in Ireland or Scotland and made payable in England, or *vice versa*, are foreign bills.^(1) Inland bills are such

\* Where a bill was drawn in Ireland on a person residing in London, who wrote to the drawer in reply to a letter advising him of the bill, saying, “that the bill would

(1) (Bills drawn in one of the United States, and made payable in another, are foreign bills. *Backner v. Findley*, 2 Peters, 589. *Dickins v. Beal*, 10 Peters, 572. *Phoenix Bank v. Hussey*, 12 Pick. 483. *Wells v. Whitehead*, 15 Wend. 527.)

as are drawn and made payable in England, Ireland, or Scotland respectively; and it is immaterial that a bill is drawn on a person residing abroad, provided it be made payable in that part of the United Kingdom in which it is drawn. Where a bill was drawn in London on a person residing in Brussels, and made payable in London; held, that it was an inland bill, and required a stamp as such.<sup>a</sup> By the statute 1 & 2 Geo. IV, c. 78, s. 2, bills drawn and made payable in Ireland or in Scotland respectively, are inland bills, and require an acceptance in writing *upon them*.<sup>b</sup>

**Properties of a bill of exchange.** Though a bill of exchange is a chose in action or a simple contract, yet it has particular properties which do not attach to these. 1st, A *chose in action* is not assignable; yet a bill of exchange may be transferred, so as to vest in the holder a legal as well as an equitable interest, and entitle him to sue thereon in his own name. 2dly, In actions upon *simple contracts* the consideration must be averred and proved, whereas a bill of exchange, like a specialty, *prima facie* imports consideration. If a bill be made payable "to bearer," the property in it is transferred by mere delivery; if "to order," it is assignable by indorsement, which is a written order on the back of the bill. The person who so assigns it is called the *indorser*, and the party to whom it is assigned is called the *indorsee*. Any person who is in possession of the bill, and entitled to sue upon it, may be called "*the holder*."

**Definition of a promissory note.** 2.—*Of a promissory note.*] A promissory note is a promise or engagement in writing to pay a specified sum, at a time therein limited, to a person therein named, or his order, or to the bearer. The person who makes the note, is called the *maker*; the person to whom it is payable, the *payee*; and the person to whom he transfers the interest by indorsement, the *indorsee*.<sup>c</sup>

At common law a promissory note, or as it is sometimes called, a note of hand, was not transferable by indorsement, nor could it be declared upon as an instrument; it was merely considered as evidence of a debt;<sup>d</sup> but the 3 & 4 Anne, c. 9, made such notes transferable by indorsement, and gave the like remedy upon them as upon bills of exchange.

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be honored on appearance;" held, a sufficient acceptance, as it was not an inland bill of exchange within the 1 & 2 Geo. IV, c. 78, which required the acceptance of an inland bill to be in writing on such bill. The court observed that Irish and Scotch bills drawn upon England were foreign before the respective Unions, and the Unions did not make them inland bills. *Mahoney v. Ashlin*, 2 B. & Ad. 478. (22 Eng. C. L. 127.)

<sup>a</sup> *Amner v. Clark*, 1 Gale, 191. 2 C. M. & R. 468.

<sup>b</sup> *Mahoney v. Ashlin*, 2 B. & Ad. 478. (22 Eng. C. L. 127.) See 9 Geo. IV, c. 24, s. 8.

<sup>c</sup> Chitt. 548. Bayl. 1 Byles, 3. 2 Bl. Com. 467.

<sup>d</sup> *Clerke v. Martin*, 2 Lord Raym. 758. *Trier v. Bridgman*, 2 East, 359. *Blankenhagen v. Blundell*, 2 B. & A. 417. *Brown v. Harraden*, 4 T. R. 148.

While a promissory note continues in its original shape, of a promise from one man to pay to another, it bears no similitude to a bill of exchange, yet when it is indorsed the resemblance begins; for then it is an order by the indorser upon the maker of the note to pay to the indorsee. The indorser becomes as it were the drawer, the maker of the note the acceptor, and the indorsee the payee.<sup>a</sup> The statute places promissory notes on the same footing as bills of exchange, therefore, the rules established in respect of the one, are equally applicable to the other.<sup>b</sup> It has been held, that the statute extends to notes made in a foreign country; therefore, where a promissory note was made in Scotland, the court held, that the indorsee might maintain an action on it against the maker in England, for it was both within the words and spirit of the act. The act was made for the advantage of trade, and therefore ought to receive a liberal construction. It was for the advantage of commerce that foreign as well as inland bills should be negotiable.<sup>c</sup> So, a promissory note made in England, payable to order or to bearer, is transferable in a foreign country by indorsement or delivery, for the statute makes notes transferable in the same manner as bills of exchange, which, by the custom of merchants, were negotiable abroad before the statute passed.<sup>d</sup>

Properties  
of a pro-  
missory  
note.

\*338

3.—*Of bank notes.*] Bankers' cash notes, formerly goldsmiths' notes, are promissory notes given by bankers, who were originally goldsmiths. These notes (except in case of bank post bills) are payable to bearer on demand, and are, therefore, called cash notes, and treated as money.<sup>e</sup> They appear originally to have been given by bankers to their customers, as acknowledgements of having received money to their use.<sup>f</sup> When formerly issued by London bankers, they were called shop notes. Their negotiability was not clearly established before the statute of Anne, which put them on a footing with bills. In point of form, they are similar to promissory notes payable to bearer or order on demand. Though they are transferable by delivery, they may be indorsed, in which case they may be declared upon as against the indorser. In other respects they are affected by the same rules as bills of exchange. The circulation of bank notes, or other notes payable

Definition  
of a bank  
note.

<sup>a</sup> Per Lord Mansfield, *Heylin v. Adamson*, 2 Burr. 676. But this resemblance, so far as regards the remedy by action of debt, does not hold. *Per Curiam*, in *Bishop v. Young*, 2 B. & P. 83. Chitt. 553.

<sup>b</sup> *Brown v. Harraden*, 4 T. R. 148.

<sup>c</sup> *Milne v. Graham*, 1 B. & C. 192. (8 Eng. C. L. 57.) *Bentley v. Northouse*, M. & M. 66, (22 Eng. C. L. 251,) S. P. *Pollard v. Herries*, 3 B. & P. 335. *Hou-riet v. Morris*, 3 Campb. 303.

<sup>d</sup> *De la Chaumette v. The Bank of England*, 2 B. & Ad. 385. (22 Eng. C. L. 106.) This point had previously been a subject of doubt. S. C. 9 P. & C. 208. (17 Eng. C. L. 356.)

<sup>e</sup> *Miller v. Race*, 1 Burr. 457.

<sup>f</sup> *Ford v. Hopkins*, 1 Salk. 283.



on demand, under the amount of five pounds is prohibited.<sup>a</sup> When a good tender. Country bank notes have been held to be a good tender if not objected to on that account.<sup>b</sup> Bank of England notes are a legal tender for all sums above five pounds, except at the bank itself, or at its branches.<sup>c</sup> The holder of a bank note is *prima facie* entitled to prompt payment of it, and cannot be affected by the previous fraud of any holder in obtaining it, unless his privity in such fraud be shown.<sup>d</sup>

Definition of a check. 4.—*Of checks.*] A check is a written order addressed to a banker, to pay on presentment to a person therein named, or to bearer, a sum of money therein specified. It is exempted \*339 from \*stamp duties, except under certain circumstances, which will be noticed under the head "Stamps."<sup>e</sup> A check is transferable like a bill of exchange, though in practice it is treated as money, yet it is a *mere chose in action*, not in possession, and not recoverable but by action.<sup>f</sup> If a banker, having effects of his customers in hand, refuse to pay his check for a sum not exceeding such effects, he is liable to an action on the case, and the customer is entitled to a verdict for, at least, nominal damages, even though he has sustained no damage.<sup>g</sup>

Definition of an I. O. U. The common memorandum *I. O. U.* such a sum, is a mere acknowledgement of a debt, which does not amount to a promissory note, and need not be stamped, unless it contains words from which a promise to pay money may reasonably be inferred.<sup>h</sup> It is inadmissible in evidence without a stamp, to support a count upon an account stated.<sup>i</sup>

<sup>a</sup> 6 G. IV, c. 6, s. 10.

<sup>b</sup> *Owenson v. Morse*, 7 T. R. 64. *Polglass v. Oliver*, 2 C. & J. 15. *Byles*, 11. Chitt. 554. *Bayley*, 12. But if objected to on that account they are not a good tender, *id.* See *ante*, 164.

<sup>c</sup> 3 & 4 W. IV, c. 98.

<sup>d</sup> *Solomons v. The Bank of England*, 13 East, 135. See *Egan v. Threlfall*, 5 D. & R. 326. (16 Eng. C. L. 237.) *Snow v. Peacock*, 3 Bing. 406. (13 Eng. C. L. 25.) 2 C. & P. 215. (12 Eng. C. L. 95.) *De la Chaumette v. The Bank of England*, 9 B. & C. 208. (17 Eng. C. L. 356.)

<sup>e</sup> On account of the daily and immediate use of checks, the 55 G. III, c. 184, has exempted them from stamp duties, provided they be for the payment of money to the bearer on demand, and drawn upon a banker or person acting as such, and transacting the business of a banker within fifteen miles of the place where such draft or order shall be issued; and provided also that such place shall be specified in such draft or order, and that it bear date on or before the day that it shall be issued, and do not direct the payment to be made by bills or promissory notes. If these requisites be not strictly observed, an unstamped check cannot be read in evidence for any purpose, except to prove crime or fraud. Chitty, 545. *Borradaile v. Middleton*, 2 Camp. 53.

<sup>f</sup> *Per Curiam*, *Moore v. Bartrup*, 1 B. & C. 5. (8 Eng. C. L. 5.) 2 D. & R. 28. Chitt. 546.

<sup>g</sup> *Marzetti v. Williams*, 1 B. & Ad. 415, (20 Eng. C. L. 412,) *ante*, 3.

<sup>h</sup> *Israel v. Israel*, 1 Campb. 499. *Fisher v. Leslie*, 1 Esp. 426. Chitt. 458. *Byles*, 11.

<sup>i</sup> *Id.* *Payne v. Jenkins*, 4 C. & P. 324. (19 Eng. C. L. 404.) But see *Guy v. Harris*, Chitt. 558, where it was held that a check was inadmissible without a stamp, to prove a set off.

SECTION II.

OF THE PARTIES TO A BILL OF EXCHANGE, OR PROMISSORY NOTE.

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ALL persons who have a capacity to *contract*, and who are under no legal disability, may be parties to a bill of exchange; on the \*other hand, persons who through deficiency of judgment, or legal incapacity, cannot make a binding contract, will not render themselves chargeable by becoming parties to such an instrument. (1) \*340

We have already treated of the disability of infants to enter into contracts in general.<sup>a</sup> Though an infant is liable for necessities, or on a single bill (*i. e.* a bond without a penalty) for the exact sum due for necessities,<sup>b</sup> yet (though it has never been so expressly decided) the better opinion seems to be, that an infant is not liable on a promissory note, or a bill of exchange, for the same consideration, or under any circumstances.<sup>c</sup> But if an infant accepts, after he comes of age, a bill drawn upon him during his minority, he is liable to pay it;<sup>d</sup> or if, after he has attained his majority, he promises *in writing* to pay a bill accepted by him during his infancy, he thereby ratifies the contract, and renders himself responsible; as where in assumpsit by the drawer against the acceptor of a bill of exchange, the defendant proved that he was under age when he accepted the bill, in answer to which, the plaintiff put in a letter written by the defendant after he came of age to a third person in these words; "I request you to pay *H.* (the plaintiff) 101*l.* at your earliest convenience, after the date of this letter, from the money left by my grandfather, for which I have given my bill." This letter was proved to have been delivered

An infant is not liable on a bill or note

Unless he promises in writing, after he comes of age, to pay it.

<sup>a</sup> *Ante*, 134, et seq.

<sup>b</sup> Co. Litt. 172, *a. n.* 3. Trueman v. Hurst, 1 T. R. 41. Russell v. Lee, 1 Lev. 86.

<sup>c</sup> Williamson v. Watts, 1 Camp. 552, *ante*, 136. Bayley, 19. Chitt. 22. Williams v. Harrison, Carth. 160.

<sup>d</sup> Stevens v. Jackson, 4 Camp. 164.

(1) ("In the composition of a Bill of Exchange, there must be a drawer, a drawee and a payee, capable on the face of the bill of contracting personally; for these instruments are based on personal credit, and not on the credit of a fund. But either of these may be actually disabled by infancy or coverture, without impairing the existence of the bill as an instrument, or affecting the mutual recourse of the other parties; and the reason is, that it would injure the circulation of negotiable paper, were an inquiry into such facts necessary to be made, by one who takes it in the course of his business for what it purports to be." Gibson, C. J., in *Reeside v. Kaez*, 2 Wharton, 239.)

to the plaintiff's clerk, but it did not appear when. Held, that the letter must *prima facie* be taken to be written when and issued at the time it bore date, and having been written after he came of age, and before the bill became due, it amounted to a ratification of the original promise to pay according to the tenor and effect of the bill, and might be declared upon accordingly.<sup>a</sup>

- \*341 \*But when the contract made by an infant is void, a promise to ratify it after he comes of age is binding only on the ground of a pre-existing moral obligation; it is therefore the sole ground of action, and does not revive the old debt, or make it legal from the time of the contract. Therefore, it has been held, that a promise made (to pay for goods for the purpose of trade) *after* the commencement of the action, was not sufficient to sustain a replication, that the defendant (who had pleaded infancy,) ratified his contract after he came of age; for the contract was void and not merely voidable; consequently, no ground of action capable of being enforced in a court of law existed at the time when the action was brought. There was no foundation upon which the action could rest.<sup>b</sup>

Where one of two or more partners is an infant. If one of two partners is an infant, the holder of a bill accepted by both partners may declare on it as accepted by the adult only in the name of both; and if the defendant pleads in abatement that the other partner ought also to be sued, the plaintiff may reply his infancy, and it is no departure.<sup>c</sup> It is not clearly established, whether an infant, first indorsee, can by such indorsement, give currency to a bill of exchange, so as to enable the holder to sue on it.<sup>d</sup> But where the defendant accepted a bill drawn by two infants, who indorsed it; held, in an action by the indorsee, that the defendant could not set up the infancy of the drawer or indorser as a defence, after having admitted the competency of the drawer by accepting the bill.<sup>e</sup> So it has been held that the infancy of the payee is no answer to \*an action by the indorsee against the drawer; for infancy is a personal privilege, of which no person but the infant can avail himself.<sup>f</sup>

<sup>a</sup> Hunt v. Massey, 5 B. & Ad. 902. (27 Eng. C. L. 230.) If the defendant had not written the letter until after the bill had become due, it might be otherwise, for then perhaps he could not be said to promise to pay according to the tenor and effect of the bill. Per Littledale, J. *id.* The promise must be in writing. 9 G. IV, c. 14.

<sup>b</sup> Thornton v. Illingworth, 2 B. & C. 824. (9 Eng. C. L. 256.) 4 D. & R. 545, *ante*, 139. The court treated the contract in this case as absolutely *void*; yet it seems that if the promise had been made before the commencement of the action, it would be sufficient. In Hunt v. Massey, *supra*, Taunton, J., said that the contract was *voidable* only, and that when ratified it became binding *ab initio*, and the *original promise* might be declared upon. It did not appear what was the consideration for the acceptance, or why it was *voidable* only. The principle to be collected from these cases is, that if a contract by an infant be *void*, the promise after he becomes of age is the *sole ground* of action; if *voidable* only, the original debt or contract is revived by the new promise.

<sup>c</sup> Burgess v. Merrill, 4 Taunt. 468.

<sup>d</sup> Chitt. 23.

<sup>e</sup> Taylor v. Croker, 4 Esp. 187. See also Jones v. Darch, 4 Price, 300 and Drayton v. Dale, 2 B. & C. 293. (9 Eng. C. L. 91.)

<sup>f</sup> Grey v. Cooper, S. N. P. 297. 3 Doug. 65. (26 Eng. C. L. 36.)

An infant may sue upon contracts which are for his benefit,<sup>a</sup> and therefore may maintain an action on a bill of exchange which is made in his favor.<sup>b</sup>

2.—*Married women.*] The capacity of a married woman to enter into contracts in general, will be treated of under the title of Husband and Wife; we shall in this place confine ourselves to the effect of her becoming a party to a bill of exchange or promissory note. It may be laid down as a general rule, that a married woman cannot, at law, bind herself or her husband by becoming a party to a negotiable instrument, without his authority, express or implied.<sup>c</sup>

A married woman cannot bind herself by signing a bill or note, nor can she thereby bind her husband without his authority.

Where a note was given to a married woman, (who carried on business in her own name with the consent of her husband) with intent that she should indorse it to the plaintiff in discharge of a debt which she owed him; held, that no interest passed by her indorsement to the plaintiff as the delivery of the note to her vested the interest in her husband; nor could the plaintiff recover on the money counts, as no money passed.<sup>d</sup> But it has been held that the indorsement by a married woman with her husband's assent, of a bill drawn by her is binding upon him and will pass the interest to the indorsee, so as to enable him to sue the acceptor.<sup>e</sup> So, on a note being presented for payment, the defendant (the maker) promised to pay the indorsee of the wife, who passed and indorsed it by a name different from that of her husband, and with his knowledge, the jury were directed to infer an authority to make such indorsement.<sup>f</sup> But where the husband could not write, and the wife was in the habit of writing for him what was requisite, and she made \*and signed a note in his name, which did not appear to have been given for any of his concerns; in an action by the indorsee against the husband, it was left to the jury to *presume* that it was given for the husband's concerns, and they found for the plaintiff; but on a rule *nisi* for a new trial, the court held, that there was nothing to warrant such presumption by the jury.<sup>g</sup>

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Where a note is payable to a single woman, and she marries it becomes her husband's property, and he alone can indorse it;<sup>h</sup> (1) the wife may join in an action upon it,<sup>i</sup> or he may sue

A note payable to a wife is

<sup>a</sup> Warrick v. Bruce, 2 M. & S. 205, *ante*, 141.

<sup>b</sup> Holliday v. Atkinson, 5 B. & C. 501. (11 Eng. C. L. 286.)

<sup>c</sup> Marshall v. Rutton, 8 T. R. 545.

<sup>d</sup> Barlow v. Bishop, 1 East, 432.

<sup>e</sup> Prestwich v. Marshall, 7 Eng. 565. (22 Eng. C. L. 242.) 5 M. & P. 513. 4 C. & P. 594. (19 Eng. C. L. 541.)

<sup>f</sup> Cotes v. Davis, 1 Camp. 485. Prince v. Brunatte, 1 Bing. N. C. 435. (27 Eng. C. L. 447.)

<sup>g</sup> Smith v. Pedley, Bayl. 48.

<sup>h</sup> Connor v. Martin, 3 Wils. 5. So if made to a married woman, Barlow v. Bishop, *supra*.

<sup>i</sup> Com. Dig. Baron & Feme, O. X.

(1) (The wife may indorse it, if the circumstances of the case be such as to warrant the presumption that the indorsement was made with the assent of the husband. *Miller v. Delamater*, 12 Wend. 433.)

the property of the husband.

alone, for the marriage gives him all the rights of an indorsee, as he alone can indorse it;<sup>a</sup> and if not recovered upon during their joint lives it reverts to the woman if she survives, or goes to her husband as her administrator if he survives.<sup>b</sup> So the husband and wife may sue jointly on a note made to the wife during coverture;<sup>c</sup> or he may sue alone,<sup>d</sup> or he may indorse it.<sup>e</sup>

Where the husband was sentenced to transportation, but kept on board the hulks instead of being sent abroad and the wife carried on business in her own name, occasionally visiting him; held, that a bill accepted by her under such circumstances constituted a good petitioning creditor's debt on her becoming a bankrupt.<sup>f</sup>

A married woman is liable on her note, in equity.

\*344 But though a married woman cannot *in law* bind herself by becoming a party to a bill of exchange or promissory note, yet she may thereby render herself chargeable in *equity*. As where she is treated as a *feme sole* in respect of her property; as where a married woman gave a promissory note payable on demand, in consideration of money advanced to her, it was decreed on a bill filed against herself and her husband, that the \*trustees of her marriage settlement should pay the note out of her separate estate.<sup>g</sup> So where she gave a note jointly with her husband as a security for his debt.<sup>h</sup> So where she accepted a bill of exchange while she lived separate from her husband and had a separate maintenance.<sup>i</sup> So where she accepted an accommodation bill.<sup>j</sup>

3.—*Mental incapacity.*] Mere weakness of intellect or lunacy, if there be no fraud or imposition, does not exempt a party to a bill of exchange from liability; for no person will be allowed to stultify himself in defending an action.<sup>k</sup> But if being in a state of mental incapacity, or intoxication, so as not to know what he was about, he has been unfairly induced to sign a bill of exchange, he will not be liable on it, even in the hands of a *bonâ fide* holder.<sup>l</sup>

4.—*Corporations.*] Corporations are mentioned in the sta-

<sup>a</sup> M'Neillage v. Holloway, 1 B. & A. 218. Mason v. Morgan, 4 N. & M. 46.

<sup>b</sup> Co. Litt. 351, b.; and see Richards v. Richards, 2 B. & Ad. 453. (22 Eng. C. L. 119.)

<sup>c</sup> Philliskirk v. Pluckwell, 2 M. & S. 293.

<sup>d</sup> Burrough v. Moss, 10 B. C 558. (21 Eng. C. L. 128.)

<sup>e</sup> Mason v. Morgan, 2 Ad. & Ell. 30. (29 Eng. C. L. 19.) 4 N. & M. 46.

<sup>f</sup> *Ex parte* Franks, 7 Bing. 762. (20 Eng. C. L. 323.) 1 Moore & S. 1. (28 Eng. C. L. 249.)

<sup>g</sup> Bullpin v. Clarke, 17 Ves. 366.

<sup>h</sup> Hulme v. Tenant, 11 Ves. 209.

<sup>i</sup> Stewart v. Ld. Kirkwall, 3 Madd. 387.

<sup>j</sup> Bingham v. Jones, Chitty, 791.

<sup>k</sup> Baxter v. Lord Portsmouth, 5 B. & C. 170. (11 Eng. C. L. 190.) Beverly's case, 4 Co. 123. Brown v. Joddrell, 3 C. & P. 30. (14 Eng. C. L. 196.)

<sup>l</sup> Sentence v. Poole, 3 C. & P. 1. (14 Eng. C. L. 179.) Pitt v. Smith, 3 Camp. 33. Gregory v. Fraser, *id.* 454. B. N. P. 172.

tute of Anne as persons who can make or indorse notes, and to whom notes may be payable. The inference from the provisions of that statute is, that by the custom of merchants they might, in some cases at least, become parties to, and sue upon bills of exchange. But if the being parties to bills or notes were inconsistent with the purpose for which they were incorporated, that inconsistency might be a bar to any remedy by or through or against them, on a bill or note. And where a corporation is empowered by statute to raise money by notes for a special purpose, if it issue notes without stating thereon that they were given for that purpose; the corporation may resist payment on the ground that they were given for another purpose, and this will be a defence even against an innocent indorsee.\*

Power to issue notes for a specific purpose.

By several statutes passed for the protection of the monopoly of the Bank of England,<sup>b</sup> corporations, companies, societies, or partnerships, consisting of more than six persons, are prohibited under a penalty of 50*l.* for each offence, from issuing any bill or note payable on demand, within sixty-five miles of London, and from borrowing, owing and taking up, any sum of money on any bill or promissory note of theirs payable at any less time than six months, within sixty-five miles of London. But this restriction does not extend to companies or corporations, transacting banking business, at a greater distance than sixty-five miles from London, and not having any house of business in London or within sixty-five miles thereof. And it is provided by the act that such companies may have agents in London, or at any other place at which such bills or notes shall be made payable, for the purpose of payment only, but no such bills or notes shall be for any less sum than five pounds; provided, also, that any banking company or corporation or partnership, though consisting of more than six persons, may carry on banking business in London, or at any other place if they do not borrow, owe or take up in England, any sum or sums of money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof, during the continuance of the privilege granted to the Bank of England.<sup>c</sup>

Statutes for the protection of the monopoly of the Bank of England.  
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The 7 Geo. IV, c. 46, s. 2, permitted banking-companies carrying on business more than sixty-five miles from London, though exceeding six in number to draw bills amounting to 50*l.* or upwards, payable in London, or elsewhere, at any period after date or sight; and this privilege has been extended by 3 & 4 W. IV, c. 83, which allows such banking companies to make a bill of exchange or promissory note of such company, &c., payable in London, by any agent of theirs, or to draw on

\* Bayley, 68. *Slark v. Highgate Archway Company*, 5 Taunt. 792. (1 Eng. C. L. 268.)

<sup>b</sup> 39 & 40 G. III, c. 98, s. 15. 7 G. IV, c. 46. 3 & 4 W. IV, c. 98.

<sup>c</sup> 3 & 4 W. IV, c. 98, s. 3.



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an agent in London, payable on demand, or otherwise, for any less sum than 50l.<sup>a</sup> The exclusive privileges conferred on the Bank of England by these acts, are to be determined by a year's notice, given after the 1st of August, 1844, and upon repayment by parliament to them of all the debt due from the public at the "time of the expiration of such notice, and in the event of such notice being deferred until after the first day of August, 1855, the said exclusive privileges shall cease and determine at the expiration of a year after such notice."<sup>b</sup>

The protection is only as against banking companies and corporations.

A banking partnership, consisting of more than six persons, cannot accept a bill of exchange within 65 miles of London.

It has been determined that the protection meant to be given by these acts to the Bank of England, was only against *corporations* and *banking companies*, and that a commercial company consisting of more than six partners were not thereby prohibited from issuing promissory notes payable at a shorter time than six months.<sup>c</sup> But where a *corporation* accepted a bill payable at three months after date, it was held to be within the prohibition; and it was distinguished from the preceding case, because there it did not appear on the face of the instrument that the security was made by more than six persons, whereas in this case the bill was accepted by a *corporation*, and, therefore, within the words of the prohibitory enactment.<sup>d</sup> And in a recent case, the court of common pleas decided, on an issue sent by the Master of the Rolls, that a co-partnership consisting of more than six persons, and carrying on the business of bankers within sixty-five miles of London, cannot in the course of their trade or business as bankers, accept a bill of exchange payable at less than six months from the time of such acceptance; for acceptance by a banker came *within* the terms borrow, owe, or take up, used in the statutes. "A bill of exchange so accepted," said Tindal, C. J., in delivering the judgment of the court, "cannot lawfully be issued; it falls within the prohibition contained in the statute 3 & 4 Will. IV, c. 98, and within the mischief which the statute of Ann, and all the subsequent statutes intended to provide against, viz., the permitting any other body corporate, or any partnership consisting of a large number of persons to enter into competition with the Bank of England."<sup>e</sup>

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An agent may be

5.—*Agent.*] Any party competent to bind himself by a negotiable instrument, may draw, accept, or indorse a bill by his \*agent, as well as by himself; and in these cases he is said to draw, accept, or indorse by *procuracion*. No particular form of appointment is necessary to enable an agent to charge

<sup>a</sup> 3 & 4 W. IV, c. 83, s. 2.

<sup>b</sup> 3 & 4 W. IV, c. 98, s. 5.

<sup>c</sup> *Wigan v. Fowler*, 1 Stark. 459. (2 Eng. C. L. 468.) *Perring v. Dunston*, R. & M. 426. (21 Eng. C. L. 481.)

<sup>d</sup> *Broughton v. The Manchester Waterworks Company*, 3 B. & A. 1. (5 Eng. C. L. 215.)

<sup>e</sup> *The Bank of England v. Anderson and others*, 3 Bing. N. C. 590. (32 C. L.) 3 Hodges.

his principal, by signing his name to a negotiable instrument; appointed such authority may, and indeed generally is given by parol; a party may derive an authority to accept, draw, or indorse bills of exchange, from having been appointed a *general* agent, as in the case of a factor for a merchant residing abroad, the principal is bound by all his acts,<sup>a</sup> or he may derive such authority from a special appointment for that purpose.

It is a general rule, that if an agent exceeds his authority in signing negotiable instruments, he does not thereby bind the principal. General authorities must be construed with reference to their expressed particular object. Therefore it has been decided, that where *A.* gave a power of attorney to *B.*, to demand and receive *all moneys due to A.* on any account whatsoever, and to use all means for the recovery thereof, and to appoint attorneys for the purpose of bringing actions, and to *do all other business*; the latter words must be construed with reference to the former, as meaning all business appertaining thereto, and that although the attorney might receive moneys due to the principal in *autre droit*, yet he could not, under this power, indorse a bill for him which came to his hands.<sup>b</sup> So a power of attorney given by an executrix to *B.* to act for her, as an executrix, does not authorise *B.* to accept bills to charge the executrix in her own right, though for debts due from her testator. <sup>c</sup> So a power given to *B.* to receive all salaries and money with authority to recover, compound, discharge, and give releases, does not authorise *B.* to negotiate bills received in payment, nor to indorse them in his own name.<sup>d</sup> So where *A.*, who carried on business on his own account, and also in partnership, went abroad, and gave his wife two powers of attorney, the one authorising her, among other things, to indorse and negotiate bills for him and in his name, and to his use, and generally to act for him as he himself might do if he were present; the other authorising her to pay and accept bills drawn <sup>e</sup>by his agent, as occasion should require. *B.* (who acted as *A.*'s agent, and who was also one of his partners) drew a bill upon *A.* to raise money for the partnership concern, and the wife accepted the bill. In an action by the indorsee of the bill against *A.*, the court held, 1st, that *A.* was not liable; for the authority given to the wife to accept bills drawn by the agent, did not extend to *all* bills, but to such only as were drawn by his agent *in that character*, and *B.* did not draw the bill in question as *agent*, but as *partner*; and 2dly, that the general words in the power of attorney were not to be construed at large, but as giving general powers to carry into effect the *special purposes* for which they were given, and the acceptance importing to be by procuration, the plaintiff ought to have satisfied himself it was within the wife's authority.<sup>f</sup> So a power of attorney given to *B.* to demand, sue

An appointment as agent for general purposes does not necessarily include an authority to sign bills.

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<sup>a</sup> Chitty, 33.

<sup>b</sup> Gardner v. Baillie, 6 T. R. 591.

<sup>c</sup> Attwood v. Munnings, 7 B. & C. 278.

<sup>d</sup> Hay v. Goldsmidt, 2 Smith, 79.

<sup>e</sup> Hogg v. Snaith, 1 Taunt. 347.

(14 Eng. C. L. 42.)

for, and receive all moneys, debts, and dues, and to give sufficient discharges, does not authorise *B.* to *indorse* bills for his principal.<sup>a</sup>

An authority may be implied

An authority may be implied from circumstances, if a person has frequently subscribed negotiable instruments for another, and that other has recognised such acts. Where, in an action against *A.* as the acceptor of a bill, the defence was that the acceptance was forged by *B.*, and it having appeared that *A.* and *B.* were connected in business, and that *A.* had several times previously paid bills so accepted by *B.*; held, that this was an answer to the case of forgery; for though *A.* might not have accepted the bill, he adopted the acceptance.<sup>b</sup> And if a person has frequently subscribed instruments in the name of another, it will authorise a jury to presume that he had authority from such other to do so.<sup>c</sup> Where the defendants' confidential clerk had been accustomed to draw checks for them, and in one instance they authorised him to indorse, and in two other instances they received money obtained by his indorsing

\*349 \*in their name; held, that a jury was warranted in inferring that the clerk had a general authority to indorse.<sup>d</sup> If *A.* permits *B.* to draw bills in his name, he is liable as drawer to ignorant indorsers, though he had no interest, nor knew of the particular bills being drawn; but he is not liable to a payee having knowledge of the transaction.<sup>e</sup> Where by a resolution of a mining company, four directors were necessary for the doing of any act binding on the company; three of the directors who were appointed trustees gave a power of attorney to the agent of the company to draw bills; held, that the other members of the company were not bound by bills so drawn, as the power was not executed by four directors.<sup>f</sup>

An agent cannot delegate his authority.

As the authority of an agent is not coupled with an interest, he cannot delegate it, so as to enable another person to act for his principal, unless an express authority be given for that purpose.<sup>g</sup>

Consequences of an agent exceeding his authority.

If a bill be drawn, accepted, or indorsed by *procuration*, it will not bind the principal, (as has been already observed,) unless the act were within the scope of the agent's authority; consequently the party taking such an instrument should satisfy himself that the act of the agent was within his authority; for otherwise he may not be able to enforce payment; or he may

<sup>a</sup> *Murray v. East India Company*, 5 B. & A. 204. (7 Eng. C. L. 66.) If *A.* authorises *B.* to draw bills on him, and *B.* does so, this will not constitute *A.* the drawer, nor subject him to the liability to be sued as such. *Ducarry v. Gill*, M. & M. 450. 4 C. & P. 121. (19 Eng. C. L. 302.)

<sup>b</sup> *Barber v. Gingell*, 3 Esp. 60.

<sup>c</sup> See *Neal v. Irving*, 1 Esp. 61. *Hawton v. Ewbank*, 4 Campb. 188. *Watkins v. Vince*, 2 Stark. 368. (3 Eng. C. L. 386.)

<sup>d</sup> *Prescott v. Flynn*, 9 Bing. 19. (23 Eng. C. L. 246.) 9 M. & Scott, 18.

<sup>e</sup> *Smith v. Stanger*, Peake, Add. 116, 119, S. P.

<sup>f</sup> *Ducarry v. Gill*, 4 C. & P. 121. (19 Eng. C. L. 302.) M. & M. 450.

<sup>g</sup> *Coombe's Case*, 9 Co. 75. *Palliser v. Ord*, Bunb. 166.

even be liable to refund, if payment has been made to him, or to any subsequent holder. But it seems that a defect in the power of the agent will not subject an innocent holder to refund if he has obtained payment, especially if the person paying inspected the power before he paid, and the holder had no opportunity of doing so.\* If an agent indorse without authority a bill payable *to order*, such indorsement conveys no right of action, except against the party indorsing; but the unauthorised delivery of a bill or note payable *to bearer*, gives a fair *bonâ fide* holder a claim on the other parties.<sup>b</sup>

\*An agent authorised to draw, accept, or indorse bills for the principal, should execute his authority in the name of the principal, or if he signs his own name, he should state in the instrument, that he did so as agent, or by procuration of *A. B.* (the principal,) otherwise he may render himself responsible, and exempt the principal from liability; for, "it is a universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it *for another*, or by *procuration* of another, which are words of exclusion; unless he says plainly, '*I am the mere scribe*,' he becomes liable."<sup>c</sup> Where a broker sold goods and drew upon the buyer in favor of his principal, the bill having been dishonored: held, that the broker was liable to his principal on it, as he had put his name thereon.<sup>d</sup> So where the plaintiff employed the defendant to procure him bills on Portugal, the defendant did so, and indorsed the bills without any qualification to the plaintiff at Paris; held, that he was liable to the plaintiff on the indorsement, and that he could not give any evidence to show that he acted as agent to the plaintiff in so doing.<sup>e</sup> So where a bill of exchange was drawn in these words, "At thirty days sight pay to *J. S.* or order, 200*l.* value received of him, and place the same to account of as per advice, from Charles Mildmay. To Mr. Humphrey Bishop, cashier of the York Buildings Company," &c. This bill was accepted by H. Bishop without any qualification, and in an action by the indorsee against him it appeared that the letter of advice was addressed to the Company, and that the defendant had accepted the bill in the same manner as he had accepted other bills; held, notwithstanding, that he was liable; for on the face of the bill it imported to be

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Mode in which an agent should draw, accept, or indorse.

Cases where parties signing bills in the capacity of agents were made personally responsible.

\* Attwood v. Munnings, 7 B. & C. 278, (14 Eng. C. L. 42,) ante, 348. East India Company v. Tritton, 3 B. & C. 280. (10 Eng. C. L. 79.) Bayley, 73. Chitty, 32.

<sup>b</sup> Bayley, 129, 130. Anon. Lord Raym. 738. Miller v. Race, Burr. 452. Grant v. Vaughan, id. 1516.

<sup>c</sup> Per Lord Ellenborough, in Leadbitter v. Farrow, 5 M. & S. 349.

<sup>d</sup> Lefevre v. Lloyd, 5 Taunt. 749. (1 Eng. C. L. 250.)

<sup>e</sup> Goupy v. Harden, 7 Taunt. 159. (2 Eng. C. L. 58.) 9 Marsh, 454. Where an agent for an association was authorised by them to draw bills; held, that the association were not liable to pay bills drawn by him in his own name, and not as agent. Ducarry v. Gill, M. & M. 450. (19 Eng. C. L. 302.)

\*351 drawn upon the defendant, and it was accepted by him generally, and not as a servant to the company. A bill of exchange was a contract by the custom of merchants, and the whole of that contract must appear in writing. In this \*case there was nothing in writing to bind the company, nor could any action be maintained against them on it. For the addition of cashier to the defendant's name was only to denote the person with certainty. The direction was only to the use of the drawee, and the letter of advice could not vary the case as against the indorsee, because the indorser would only look to the bill itself.<sup>a</sup> But if a man employed to get a bill discounted, be unable to effect it without indorsing it, though he bind himself to the indorsee, he will be entitled to be indemnified by his employer, though his employer's name be not on the bill.<sup>b</sup>

A broker at *N.* shipped a cargo of coals, and drew a bill of exchange on the consignees in favor of the vendors. The bill being returned by the acceptors, in consequence of the shortness of the date, the vendors, by the direction of the broker, drew another bill at a longer date. It was taken to the broker's counting-house for signature; but the broker having left *N.* in consequence of embarrassment, the defendant, who had come there to investigate his affairs, at the request of the vendors, and for their convenience, signed the second bill generally; held, that he was personally liable on the bill; though if he had stated that he drew it as agent, and had asked for a written acknowledgment, that he should only be liable as agent, he would have got rid of the personal obligation to which by signing generally a party is liable.<sup>c</sup> Yet where *A.* and *B.* signed a formal promissory note, by which they promised "as churchwardens and overseers," to pay to *C.* or order a sum of money, with interest which sum was in fact the amount of a loan made by *C.* for the use of the parish; held, that they were personally liable upon such note, for they could not bind themselves as parish officers; they contracted, therefore, as individuals, the addition of their titles to their signatures could not destroy their individual liability.<sup>d</sup>

\*352  
Signing  
as agent,  
without  
authority.

\*If a person accept a bill *as agent*, without any authority to do so, neither he nor the supposed principal is liable on the bill. The principal is not, because he gave no authority; nor is the person so accepting it, because no one can be liable as acceptor, except the person to whom the bill is addressed, unless he be an acceptor for honor; but he will be liable to a special action on the case for falsely representing that he had authority. As where a bill was presented for acceptance at

<sup>a</sup> *Thomas v. Bishop*, Stra. 955. See *Eaton v. Bell*, 5 B. & A. 37. (7 Eng. C. L. 13.)

<sup>b</sup> *Ex parte Robinson*, Buck. 113. Bayley, 72.

<sup>c</sup> *Sowerby v. Butcher*, 2 C. & M. 368, *post*.

<sup>d</sup> *Crew v. Petit*, 3 Nev. & M. 456; S. C. nom. *Rew v. Pettet*, 1 Adol. & Ellis, 196 (28 Eng. C. L. 66.)



the office of the drawee in his absence, and *A.*, who resided there, accepted it by procuration for the drawee without any authority, believing that the latter would sanction the acceptance and pay the bill. The indorsee having brought an action against the drawee, on proof of the above facts, was nonsuited. The indorsee then sued *A.* for falsely and fraudulently representing that he had authority to accept the bill as agent. At the trial, the jury negatived all *fraud in fact*; but the court held, notwithstanding, that *A.* was liable, because the making of a representation which the party knows to be untrue, and which is *intended* and calculated to induce another to act on the faith of it, so that he may incur damages, is a *fraud in law*, and *A.* must be taken to have intended to make such representation to all who received the bill in the course of circulation; held, also, for the reason above stated, that *A.* was not liable as acceptor.<sup>a</sup>

Where a clerk in a firm, after the death of two of the partners, being employed by a surviving partner to wind up the partnership affairs, drew and indorsed a bill of exchange in the name of the firm; held, that he was not liable on the bill, at least without some evidence that he had used the name of his principal without authority.<sup>b</sup>

6.—*Partners.*] By the custom of merchants, if one partner in trade draw, accept, or indorse a bill, check or note, in the name and seemingly on behalf of the firm, such act will render all parties liable to a *bond fide* holder, though the instrument had no relation to the joint trade, and the other partners were wholly ignorant of the transaction, and were even intentionally defrauded by their partner.<sup>c</sup> “But to subject a person to responsibility as a partner, for the acts of another done without his express concurrence, he must stand in one or other of these two situations; first, he *\*must at the time* of making the contract, whether bill, note, or other instrument, have been actually a partner in a joint concern; or secondly, admitting that he was not, he must have represented or permitted himself to be represented as such, before or at the time of making the contract, either generally to all the world, or to several individuals, or to the plaintiff in particular or to some person through whom he claims.”<sup>d</sup>

If one partner give a partnership bill or note for his own private debt without the knowledge of the partnership, it is a fraud upon his partners; notwithstanding which they will be liable on such bill to a *bond fide* holder, but not to a holder who was cognisant of the fraud at the time that he took the bill or

Liability  
of partners

\*353

Bill for a  
private  
debt.

<sup>a</sup> Polhill v. Walter, 3 B. & Ad. 114. (23 Eng. C. L. 38.)

<sup>b</sup> Wilson v. Barthorpe, 1 Mur. & Hur. 81.

<sup>c</sup> Swan v. Steel, 7 East, 210. Ridley v. Taylor, 13 East, 175. Harrison v. Jackson, 7 T. R. 207. Sutton v. Gregory, Peak's Add. 150.

<sup>d</sup> Per Tindal, C. J., in Fox v. Clifton, 6 Bing. 795. (19 Eng. C. L. 233.)



note.<sup>a</sup> The distinction is well settled, that if a creditor of one of the partners collude with him to take payment or security, for his individual debt, out of the partnership funds, knowing at the same time that it is without the consent of the other partner, it is fraudulent and void; but if it be taken *bond fide* without such knowledge at the time, no subsequently acquired knowledge of the misconduct of the partner in giving such security can disaffirm the act.<sup>b</sup> When a partnership name is pledged, the partnership, of whomsoever it may consist, whether the partners are named in the firm or not, and whether they are known or secret partners, will be bound, unless the conduct or title of the person who seeks to charge them can be impeached.<sup>c</sup>

Signature  
by a partner  
in his  
own name.  
\*354

It may be here observed, that if a negotiable instrument be signed by a partner in his own name, it will not bind the firm, even though the proceeds be applied to partnership purposes, \*unless the name of that partner be also the name of the firm.<sup>d</sup> But if a partnership business be carried on in the name of one member only, a bill or note signed by him will render the other partners liable, if such instrument was given upon a partnership transaction; but if such bill be issued, and the proceeds be applied to the separate use only of the partner so signing it, the other partners will not be liable on it, because no partnership firm was pledged.<sup>e</sup> It has been held, that if a bill *be drawn upon a firm*, and one of the partners accept it in his own name, the partnership is thereby bound; for he must be understood to exercise his power to bind his copartners, and to accept the bill according to the terms in which it is drawn;<sup>f</sup> so where *A.*, *B.* and *C.* were partners, and *A.* drew a bill in these words: sixty-one days after date, *I* pay Lord G—— or order, 200*l.* for *A.*, *B.* and *C.*; held, sufficient to bind the firm.<sup>g</sup> In such a case the holder of the notes may sue the individual member signing it, or the whole firm, for the word *I* creates a several promise by each party that signs.<sup>h</sup> Where *A.* was member of a firm known by the name of *B.* and *C.*;

<sup>a</sup> Lord Galway *v.* Mathew, 10 East, 264. In this case the plaintiff knew before he took the note that the defendant would not be liable for drafts drawn by his other partners on the partnership account. This action was for a draft drawn by one of the partners. The plaintiff was nonsuited.

<sup>b</sup> Per Lord Ellenborough, in Swan *v.* Steel, 7 East, 213. And see Arden *v.* Sharpe, 2 Esp. 523. If a new partner be introduced into a firm, and there be an acceptance by the old partners, in the name of the new firm, for a debt due from the old firm, the new partner will not be liable on the bill, in the hands of a person who was cognisant of the circumstances before he took it. Shirreff *v.* Wilks, 1 East, 48.

<sup>c</sup> Per Bayley, Baron, in Wintle *v.* Crowther, 1 C. & J. 310. 1 Tyr. 214.

<sup>d</sup> Emly *v.* Lye, 15 East, 7. *Ex parte* Emly, 1 Rose, 61.

<sup>e</sup> *Ex parte* Bolitho, 1 Buck. 100. South Carolina Bank *v.* Case, 8 B. & C. 427. (15 Eng. C. L. 256.) Bayley, 54. Wintle *v.* Crowther, 1 C. & J. 310.

<sup>f</sup> Mason *v.* Rumsey, 1 Camp. 384.

<sup>g</sup> Lord Galway *v.* Mathew, *id.* 403. S. C. but not S. P. 10 East, 264.

<sup>h</sup> Hall *v.* Smith, 1 B. & C. 407. (8 Eng. C. L. 112.) March *v.* Ward, 1 Peake, 130. Clark *v.* Blackstock, Holt, 474. (3 Eng. C. L. 159.) Wills *v.* Bark, 2 East, 264.

and *B.* and *C.* traded as partners alone in other business by the same name; held, that a bill given by *B.* and *C.*, in the common name of both firms, was binding on *A.*, though given without his knowledge, and for the benefit of the firm, in which he was not interested, and the holder may sue either firm.<sup>a</sup>

Where one of two partners, having authority to bind the other by drawing or indorsing bills of exchange, raised money by bills in fictitious names, indorsed by him in the partnership name, and the money was afterwards applied to the partnership purposes; held, that the other partner was liable.<sup>b</sup> One partner may act for the whole firm by *procurator*, and if he indorses bills for the firm in a name different from that under which they carry on business, the partnership is liable.<sup>c</sup> If a party takes a bill or note of the firm, from any of its members, knowing at the same time that it was given without the consent of the other partners, he cannot sue the firm on it, as under such circumstances he cannot be considered to have trusted the partnership;<sup>d</sup> and taking a partnership security for a separate debt raises a presumption that the creditor knew that it was given without the concurrence of the other partners; and throws upon him the *onus* of showing that his debtor had authority to give him the joint security of the firm; for *prima facie*, the transaction is fraudulent.<sup>e</sup> But to deprive the creditor of his remedy against the partnership under such circumstances, it must appear that he was guilty of *crassa negligentia*, in not inquiring beforehand whether the debtor was authorised to give him the security.<sup>f</sup> In an action by an indorsee against three acceptors, it appeared that the defendants were partners in the tea trade, and that the drawer was a wine merchant, who drew in payment for wine delivered to one of the partners. Abbott, C. J., left it to the jury to say if the bill was so drawn without the consent of the other partners, for if so, they were not liable. Verdict for the defendant.<sup>g</sup>

If a bill or note be payable to several persons who are not in partnership, the right to transfer it is in all collectively, and not in one individually; as where a bill was drawn on a father

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Taking a partnership security for a separate debt.

Where a bill is payable to, or

<sup>a</sup> *Swan v. Steel*, 7 East, 210. *Baker v. Charlton*, Peake, 80.

<sup>b</sup> *Thicknesse v. Brownlow*, 2 C. & J. 425.

<sup>c</sup> *Williamson v. Johnson*, 1 B. & C. 146. (8 Eng. C. L. 44.)

<sup>d</sup> *Arden v. Sharp*, 2 Esp. 523.

<sup>e</sup> *Green v. Deakin*, 2 Stark. 347. (3 Eng. C. L. 377.) *Ex parte Bonbonus*, 8 Ves. 544. *Sheriff v. Wilkes*, 1 East, 48. *Bayley*, 59. *Ex parte Goulding*, 2 G. & J. 118. *Hope v. Cust*, cited 1 East, 53.

<sup>f</sup> *Ridley v. Taylor*, 13 East, 175.

<sup>g</sup> *Wood v. Holbeck*, Chitty, 56. *Coram*, Abbott, C. J., Guildhall, 1826.

(1) (If one partner gives a note in the name of the firm for a purpose distinct from the partnership business, the law does not presume that he acted honestly, and with the assent of his co-partners; but such apparent misuse of the partnership name is *prima facie* evidence that he acted without authority, and in fraud of his co-partners. *Eastman v. Cooper*, 15 Pick. 267. *Williams v. Walbridge*, 3 Wend. 415.)

accepted by several persons not in partnership.

\*356 Joint ownership, or particular transactions not partnership.

Partnership must be in trade, or concern wherein use of bills is usual or necessary. Joint stock company.

Where partnership name is pledged, all the partners are liable.

and son, not partners, payable to their order, the son alone indorsed it; in an action by the indorsee against the acceptor, held, that the father and son ought to have indorsed it, and that the indorsement by the son did not give the indorsee a right to sue.<sup>a</sup> So, if a bill be drawn on several persons not in partnership, an acceptance by one will bind him only.<sup>b</sup> So if there be a *joint ownership in property* only, and no partnership in trade, one party cannot bind the other by a bill or note issued without *express authority*, or inconsistent with the situation of each; as where a bill was addressed to the *two owners of a ship* for necessities supplied for the same, and one of them accepted it in the name of both; held, that the other was not liable to a *bonâ fide* holder, the acceptance having been given on account of one of them only, and for an account *unconnected* with the ship.<sup>c</sup> So where two persons agreed to take a farm and to pay for certain articles by bills at *three months*, and one of them accepted the bills at *six and twelve months* in the name of both, without the consent of the other; held, that as they were not partners, the other was not liable to be sued upon them, as he had given no authority to accept *such* bills.<sup>d</sup> In *Barker v. Charlton*,<sup>e</sup> it was decided, that where persons are partners in particular and single transactions only, and not general partners, they are not liable, even to a bona fide holder, on a bill if sued by one of them in relation to a different concern.<sup>f</sup> It has been held, that a shareholder in a mining company was not liable on a bill of exchange drawn and accepted by order of the directors of the company, it not having appeared that the directors had authority to bind the other members by negotiable instruments, nor that such a power was necessary for carrying on the concern, for it was not like a regular *trading* company.<sup>g</sup>

A member of a joint stock company has no authority implied by *law* to accept bills of exchange for the company, so as to make the other members liable; for such company is not like an ordinary partnership in trade.<sup>h</sup>

To render a party liable for a partnership debt, he must have been a partner, or have appeared to be so, at the time the contract was entered into. "The general rule is, that where a partnership name is pledged, any person who is either an actual partner, or has allowed himself to be held out to others as a partner, is liable, unless the party to whom the partnership credit is pledged, is privy to an intent to misapply the money."<sup>i</sup>

<sup>a</sup> Carrick v. Vickery, Doug. 653, n.

<sup>b</sup> B. N. P. 279. Bayley, 52.

<sup>c</sup> Williams v. Thomas, 6 Esp. 18.

<sup>d</sup> Greenslade v. Dower, 7 B. & C. 635. (14 Eng. C. L. 106.)

<sup>e</sup> Peake, 80.

<sup>f</sup> Per Bayley, J., in Vere v. Ashby, 10 B. & C. 294. (21 Eng. C. L. 82.)

<sup>g</sup> Dickinson v. Valpy, 10 B. & C. 128. (21 Eng. C. L. 41.)

<sup>h</sup> Bramah v. Roberts, 3 Bing. N. C. 963. (32 Eng. C. L.) Dickinson v. Valpy, 10 B. & C. 128, ante, 356.

<sup>i</sup> Per Bayley, J., in Vere v. Ashby, 10 B. & C. 296. (21 Eng. C. L. 82.)

Therefore, where, by a private agreement between partners, they stipulated that their partnership should be considered as commencing \*from an *antecedent period*, the court held, that one of the partners was not liable on a bill issued subsequent to *such period*, but before the partnership was actually formed.<sup>a</sup> \*357

The holder of a bill of exchange on which a firm is liable may sue only those who are known to him to be partners at the time that he takes the bill. "If I deal with *A.* he cannot with reference to that transaction say there is a contract between him and *B.*, of whom I know nothing, thus compelling me to be a joint creditor of those two whose joint property may be scarcely any thing, and not the sole creditor of the only man I know. A man purchasing from or selling to *A.*, not knowing of any partner, may consider *A.* as the sole vendor or vendee; he may, finding that *B.* has taken a share of the profits, elect to go against him also, but cannot be compelled certainly."<sup>b</sup> Where a person has a sleeping or secret partner unknown at the time, the circumstance of a holder afterwards discovering that he has a partner, does not deprive him of his option to sue or proceed against him jointly, or omit him as a defendant; and in the latter case the non-joinder cannot be pleaded in abatement.<sup>c</sup> So in an action on a bill of exchange against two partners who pleaded that the contract was made with them jointly with two others, on which issue was taken, and it appeared that the defendants had two other partners residing abroad, when the bill was drawn, but the jury having found that the plaintiff had reason to consider that the defendants alone constituted the firm; the court held, that the plaintiff was entitled to a verdict.<sup>d</sup>

Holder of a bill need not sue a dormant or secret partner.

It is a general rule that one partner cannot sue a co-partner for any debt or demand towards which he himself must ultimately contribute. Therefore, where a member of a joint stock company, for the purposes thereof, drew a bill in his own name on a debtor of the company and indorsed it to an agent of the company, who indorsed it to another member of the company; held, that the latter could not sue the drawer, \*because, both being partners, the latter would be liable to contribution, as the sum taken by the drawer, was received by him in his character of a member of the company and not on his own account.<sup>e</sup> So where *A.* sued *B.* on a note, and *B.* pleaded that the note was made by *A.* and others jointly with *B.*; held, a good plea in bar.<sup>f</sup> So where the plaintiff, a holder of shares in a washing company, drew bills

One partner cannot sue another.

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<sup>a</sup> *Id.*

<sup>b</sup> Per Lord Eldon, in *ex parte Norfolk*, 19 Ves, 455.

<sup>c</sup> Per Lord Tenterden, in *Mullett v. Hook*, M. & M. 88, (22 Eng. C. L. 259,) overruling *Dubois v. Ludert*, 5 Taunt. 609. (1 Eng. C. L. 207.)

<sup>d</sup> *De Mautort v. Saunders*, 1 B. & Ad. 398. (20 Eng. C. L. 410.)

<sup>e</sup> *Teague v. Hubbard*, 8 B. & C. 345. (15 Eng. C. L. 234.) 2 M. & R. 369.

<sup>f</sup> *Moffatt v. Van Mullingen*, 2 B. & P. 124. *Mainwaring v. Newman*, *id.* 120, S. P.

on the directors of the company for goods furnished by him and *his brother*, which bills were accepted for the directors, by the secretary of the company, who had authority to accept bills for the plaintiff's brother; held, that the plaintiff could not recover; first, because the secretary had no authority to accept bills for the plaintiff, but for his *brother* only; and secondly, because the plaintiff was a member of the company. Best, C. J.: "It may be admitted, that if one partner were to draw on other partners by name, and they were individually to accept, he might recover against them, because by such acceptance a separate right is acknowledged to exist. But that is not the case here, because the bills are drawn on the directors of the company and accepted for the directors. The case, therefore, is that of one partner drawing on the whole firm including himself. There is no principle by which a man can at the same time be plaintiff and defendant."<sup>a</sup>

Notice  
should be  
given  
when a  
partner-  
ship is dis-  
solved.

If a person has been *ostensibly* a partner in a firm, he continues to be bound by the act of his co-partners, even after a dissolution of the partnership, unless such dissolution be duly notified. It is a clear rule, that where there has been a partnership, and any change is made in the parties to it, *and no notice given thereof*, any person dealing with the partnership, either before or after the change, has a right to call on all the partners who first composed the firm.<sup>b</sup> Where after a dissolution of partnership one of the members accepted a bill in the name of the firm, and the payee had no \*notice of the dissolution, but the indorsee had; held, that the indorsee, though he had notice, was entitled to recover on the bill against the firm, as he had a right to avail himself of any circumstance which could operate in favor of the payee.<sup>c</sup>

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Mode of  
giving no-  
tice.

The ordinary mode of giving notice is by sending letters announcing the dissolution to the parties with whom they had carried on business, and by advertising it in the gazette and newspapers. It has been held, that an advertisement in the gazette is not sufficient notice of a dissolution to a former dealer, unless it be shown that he was in the habit of reading the gazette.<sup>d</sup> But it is sufficient against all persons who had not previous transactions with the firm.<sup>e</sup> If a firm of three be dissolved by the retirement of one, and after the dissolution a creditor of the three draw on the three, and the two accept in the style of the three, the two are liable.<sup>f</sup>

A dormant partner whose name had never been announced

<sup>a</sup> Neale v. Turton, 4 Bing. 149. (13 Eng. C. L. 302.)

<sup>b</sup> Per Le Blanc, J., in Parkin v. Carruthers, 3 Esp. 248. Fox v. Hanbury, Cowp. 449. Stables v. Eley, 1 C. & P. 614. (11 Eng. C. L. 497.)

<sup>c</sup> Booth v. Quin, 7 Price, 193, n.

<sup>d</sup> Leeson v. Holt, 1 Stark. 186. (2 Eng. C. L. 349.) Williams v. Keata, 2 id. 290. (3 Eng. C. L. 351.)

<sup>e</sup> Wrightson v. Pullan, 1 Stark. 375. (2 Eng. C. L. 433.) Newsome v. Coles, 2 Camp. 617.

<sup>f</sup> Ex parte Liddiard, 2 Mont. & Ayr. 87.

as connected with the firm, will not be liable on bills drawn accepted, or indorsed by the firm, after his retirement, even though he has given no notice of the dissolution; for as he had not been known as a partner, no contract could have been made with him as such.<sup>a</sup>

Retire-  
ment of a  
dormant  
partner.

When a partnership is dissolved, the partners become distinct persons, and tenants in common of the partnership effects undisposed of; and if a bill belonging to the firm be afterwards sent into circulation, they must all join in endorsing it, otherwise no title will be conveyed to the transferee, for they are to be considered as if they were not partners at all.<sup>b</sup>

\*SECTION III.

\*360

OF THE FORM AND REQUISITES OF A BILL OR NOTE.

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1.—*The form of a bill or note.*] A BILL of exchange or promissory note must be in writing, but the writing need not be made with ink or any specific materials; an indorsement on a promissory note written with a pencil, has been held valid.<sup>c</sup> No particular form is necessary to make a bill or note, but it must be an *order or promise* to pay money. An order or promise to *deliver money*, or a promise to be *accountable or responsible*, or that *A. B.* shall receive money, is a good bill or note.<sup>d</sup>(1)

A bill or  
note must  
be in writ-  
ing.

But a mere acknowledgement of a debt, without a promise to pay is not sufficient.(2) Where the instrument was in the following words: “Mr. L.—please to let the bearer have seven pounds and place it to my account, and you will oblige your

<sup>a</sup> Carter v. Whalley, 1 B. & Ad. 13. (20 Eng. C. L. 333.) Evans v. Drummond, 4 Esp. 89. Newmarsh v. Clay, 14 East, 239. Heath v. Sansom, 4 B. & Ad. 172. (24 Eng. C. L. 44.)  
<sup>b</sup> Abell v. Sutton, 3 Esp. 118. Kilgour v. Finlayson, 1 H. Bl. 155. Carrick v. Vickery, Doug. 653, ante, 356.  
<sup>c</sup> Geary v. Physic, 5 B. & C. 234. (11 Eng. C. L. 213.)  
<sup>d</sup> Morris v. Lea, Lord Ray. 1396. 8 Mod. 362. Bayley, 5.

(1) (Hitchcock v. Cloutier, 7 Verm. 22.)  
(2) (A note in this form, “Due A. B. three hundred and twenty-five dollars, payable on demand,” is a promissory note: the acknowledgment of indebtedness on its face, implies a promise to pay. Kimball v. Huntingdon, 10 Wend. 675.)



humble servant, *R. S.*” Lord Tenterden held, that it was not a bill; for it did not purport to be a demand made by a party having a right to call on the other party to pay. The fair meaning of it was, you will oblige me by doing it.<sup>a</sup> These words, “*I. O. U. 8l.*,” were held not to be a note or a bill, and therefore admissible in evidence without a stamp.<sup>b</sup> Where the words were “borrowed of *J. S. 50l.*, which I promise not to pay; held, to be a note, and that the word *not* should be rejected, for a man shall not be permitted to say, “I am a cheat, and have defrauded”<sup>c</sup>

\*361 Where the instrument was in these words, “*I A. B.*, do this day bargain and agree with *W. E.*, to give him 5*l.* for a cart, and do hereby promise and agree to pay him, without fail, in three weeks from the date hereof;” held, to be an agreement and not a promissory note.<sup>d</sup> Where the words were, “*Mr. T.* has left in my hands 200*l.*;” held, not a promissory note or a receipt, and that it was admissible in evidence without a stamp.<sup>e</sup> Where the instrument was in these words “received and borrowed of *A. B. 30l.*, which I promise to pay with interest. I also promise to pay the demands of the sick club at *H.*, in part of interest, and the remaining stock and interest to be paid on demand to the said *A. B.*; witness, my hand;” held, not to be a promissory note; it was an agreement engrafted on a note. The amount of the sick club charges was *uncertain*, and the *time* for payment was not *fixed*.<sup>f</sup>

The words of an instrument are to be taken most strongly against the party using them. Therefore, if an instrument be so ambiguous in its terms as to make it doubtful, whether it be a bill or note, the party holding it has an option to treat it as either, as against the person who framed the instrument, and if he proceed upon it as a promissory note against the maker, he need not prove notice of dishonor.<sup>g</sup> Where the words were, “on demand, I promise to pay,” &c., and the instrument was addressed to the defendant, who wrote across it, “accepted, *J. B.*,” held, by Lord Lyndhurst, a promissory note, as it contained a promise to pay, and the signature of the defendant adopted that promise.<sup>h</sup> Where the words were “two months after date, pay to the order of *J. J. 70l.* value received, *T. S.*, at Messrs. *J. & Co.*,” held, that it was pro-

<sup>a</sup> *Little v. Slackford*, M. & M. 171. (23 Eng. C. L. 280.) Yet where the words were “*Mr. N.* will oblige *Mr W.* by paying to *J. R.*, or order, 20 guineas on his account,” Lord Kenyon held it to be a bill. *Ruff v. Webb*, 1 Esp. 129.

<sup>b</sup> *Fisher v. Lishe*, 1 Esp. 426. *Childers v. Boulnois*, 1 Dowl. N. P. 8 S. P.

<sup>c</sup> *Bayley*, 5.

<sup>d</sup> *Ellis v. Ellis*, Gow. 216.

<sup>e</sup> *Tomkins v. Ashby*, 6 B. & C. 541. (13 Eng. C. L. 249.)

<sup>f</sup> *Bolton v. Dugdale*, 4 B. & Ad. 619. (24 Eng. C. L. 125.)

<sup>g</sup> *Edis v. Bury*, 6 B. & C. 433. (13 Eng. C. L. 227.)

<sup>h</sup> *Block v. Bell*, 1 M. & Rob. 149. In *Edis v. Bury*, *Littledale, J.*, said “If it was once a promissory note, *G.*, (the party to whom it was addressed,) by putting his name to it could not make it a bill of exchange.”

perly declared upon as a bill of exchange, though the word *at* was used instead of *to*.<sup>a</sup> So where the word *at* was fraudulently written in small letters to escape detection in a similar instrument.<sup>b</sup> \*If a person draw a bill upon himself, it may be declared upon as a promissory note.<sup>c</sup> \*362

A note whereby a party promises "to pay or cause to be paid 130*l*." is a promissory note, and may be declared on as such.<sup>d</sup>

"I promise to pay to *M. A. D.*, or bearer, on demand, 16*l*. at sight, by giving up clothes and papers," &c. was sued on as a promissory note; held, that if the jury thought that the clothes, &c. had been previously given up by the payee to the maker, it was a good promissory note, as the words in that case would only import the value received.<sup>e</sup>

2.—*It must be for payment of money.*] A bill or note must be for the payment of money in specie only, and it must specify the amount.

A written promise "to deliver up horses and a wharf, and to pay money at a particular day," is not a note,<sup>f</sup> nor is a written promise to pay 300*l*. to *B.*, or order, "in three good East India bonds;"<sup>g</sup> nor to pay "in cash or Bank of England notes;" because they were not absolutely and at all events for payment of money in specie.<sup>h</sup> Where a person was indicted for forging and uttering a promissory note, the note was to pay the bearer, on demand, one guinea in cash, or *Bank of England note*: held, on a case reserved, not a note within the statute, and the prisoner was pardoned.<sup>i</sup>(1)

The sum must be named; therefore, where the words were, "I promise to pay *J. E.* 65*l*., with lawful interest for the same, three months after date, *with all other sums that may be due to him*;" held, that it was not a note, but an agreement which required an agreement stamp to be admissible in evidence.<sup>j</sup> So where the note was "to pay 400*l*., first deducting thereout any interest or money *J. S.* might owe to the defend-

It must be for the payment of a certain or definite sum.

<sup>a</sup> *Shuttleworth v. Stevens*, 1 Camp. 407.

<sup>b</sup> *Allan v. Mawson*, 4 Camp. 115.

<sup>c</sup> *Roach v. Ostler*, 1 M. & R. 120. (17 Eng. L. C. 226.)

<sup>d</sup> *Lovell v. Hill*, 6 C. & P. 238. (25 Eng. C. L. 376.)

<sup>e</sup> *Dixon v. Nuttall*, 6 C. & P. 320. (25 Eng. C. L. 418.) Bolland.

<sup>f</sup> *Martin v. Chantry*, 2 Stra. 1271. <sup>g</sup> B. N. P. 272.

<sup>h</sup> *Ex parte Imeson*, 2 Rose, 225.

<sup>i</sup> *R. v. Wilcox*, Bayley, 11.

<sup>j</sup> *Smith v. Nightingale*, 2 Stark. 375. (3 Eng. C. L. 390.)

(1) (In some of the States a note to pay in Bank Notes, has been held a good negotiable note on the ground, that bank notes, though not strictly money, understanding by that term the lawful currency of the country, that which may be tendered and must be received in discharge of a subsisting debt, yet for every purpose, in the ordinary transaction of business, are considered as money. See *Keith v. Jones*, 9 Johns. 120. *Judah v. Harris*, 19 Johns. 144. *Morris v. Edwards*, 1 Ohio, 80. The principle of the text has however been adhered to in Pennsylvania. *McCormick v. Trotter*, 10 Serg. & R. 94. *Gray v. Donahoe*, 4 Watts, 10. Chancellor Kent is of opinion that the weight of the argument is in favor of the English rule. 3 Kent Com. 75.)

ant," held, that the instrument resting entirely in contingency, it could not \*be considered as a promissory note to pay a certain or definite sum at all events, though, being stamped as a note, it might between the original parties be read as evidence of a debt under the account stated.<sup>a</sup> A promise to pay ten *pound*, is a note; as where a prisoner was charged with forgery for altering a note from one pound to ten, by substituting ten for one before the word pound; held, on a case reserved, that he was properly convicted.<sup>b</sup> But a promise to pay 72*l.* on demand or render the body of *A. B.* to the Fleet before such a day, is not a note;<sup>c</sup> nor is a promise "to pay *A.* or *B.* and *C.* 250*l.*," value received, for it is a conditional promise.<sup>d</sup>

Must not  
be for less  
than 20*s.*

Negotiable notes and bills of exchange for less than 20*s.* are absolutely void;<sup>e</sup> and any person issuing or negotiating such notes is liable to a penalty of 20*l.*;<sup>f</sup> and all negotiable notes and bills issued in England, (except drafts or orders upon a banker,) for 20*s.* and less than 5*l.*, must specify the name and place of abode of the person to whom or to whose order they are made payable; they must be attested by one subscribing witness, and bear date at or before the time that they are issued, and be made payable within twenty-one days after date, otherwise they are void;<sup>g</sup> and any person issuing or negotiating such notes without complying with the regulations prescribed by the act, is subject to a penalty of 20*l.*<sup>h</sup>

3.—*Payment must not depend on a contingency.*] The promise or order must be to pay absolutely; for the payment must not depend on a contingency which may not happen, or on the sufficiency of a particular fund which may not be productive.

Therefore, where the defendant gave a note to pay 60 guineas when he married *B.*; held void, because it was uncertain whether he would ever marry or not, so time of payment might never come.<sup>i</sup> So, a promise to pay "if my brother does not \*pay by such a time."<sup>j</sup> So, a promise to pay "when my circumstances will admit without detriment to myself or family."<sup>k</sup> So, a promise to pay nine years after date, provided *M. D.* shall not return to England, or his death be duly certified in the mean time.<sup>l</sup> So, an order or promise to pay, provided the terms mentioned in certain letters written by the drawer were complied with.<sup>m</sup> So, a promise to pay "on sale or produce immediately when sold of the White Hart, St. Alban's,

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The order  
or promise  
must be to  
pay, at all  
events.

<sup>a</sup> Barlow v. Broadhurst, 4 Moore, 471. (16 Eng. C. L. 381.)

<sup>b</sup> R. v. Post, Bayley, 11.

<sup>c</sup> Smith v. Boehm, Gib. 93.

<sup>d</sup> Blanckenhagen v. Blundell, 2 B. & A. 417.

<sup>e</sup> 48 G. III, c. 88, s. 2.

<sup>f</sup> Id. s. 3.

<sup>g</sup> 17 G. III, c. 30, s. 1.

<sup>h</sup> Id. s. 2.

<sup>i</sup> Pearson v. Garret, 4 Mod. 262, cited in Willes, 397.

<sup>j</sup> Appleby v. Biddulph, id. 2 Lord Raym. 1361.

<sup>k</sup> Ex parte Tootle, 4 Ves. 372.

<sup>l</sup> Morgan v. Jones, 1 C. & J. 162.

<sup>m</sup> Kingston v. Long, Bayley, 16.

and the goods," &c.<sup>a</sup> So, an order "to pay a certain sum out of W. S.'s money as soon as you shall have received it."<sup>b</sup> So, an order to pay at thirty days after the arrival of the ship *Paragon* at Calcutta, because the ship may never arrive there.<sup>c</sup> So, a promise to pay when three drafts shall have been paid.<sup>d</sup> So, a promise to pay "four years after date, if I am then living, otherwise this bill to be null and void," is no note; for if the maker should die within four years no payment should be made. It is not like a note payable on the maker's death, which is an event that must happen.<sup>e</sup> So, an order "to pay a sum of money in your hands, belonging to the proprietors of the Devonshire Mines, being part of the consideration money for the purchase of the manor of West Buckland," is not a bill of exchange, because it is only payable out of a particular fund.<sup>f</sup> So, an instrument in the form of a note, but with a memorandum written upon it, stating that it was taken "for securing the payment of all such balances as shall be due from one of the makers to the payee, not exceeding the sum therein mentioned; but this note to be in force six months, and no money liable to be called for sooner in any case." The note was joint, and the memorandum was signed by one of the makers; held, not a note. Lord Ellenborough said, that as between the original parties it was an \*agreement.<sup>g</sup> So, where a note was given with the following memorandum indorsed upon it before it was signed, "this note is given on condition that if any dispute shall arise between Mr. Hartly and Lady Wray, respecting the fir, this note to be void: held, not a note, because payment depended upon there being no dispute between Mr. Hartly and Lady Wray."<sup>h</sup> So, a promise "to pay 10*l.* out of his money that should arise from his reversion of 43*l.* when sold, was held to be no bill or note.<sup>i</sup> *A.* having given his daughter on her marriage, the stock of a public-house, amounting in value to 1,200*l.*, she and her husband signed the following instrument, "on demand we promise to pay to *A.* or his order 1,200*l.*, for value received in stock, &c., this being intended to stand against me, *M.* (the daughter) as a set off for that sum, left me in my father's will above my sister Ann's share;" held, not a promissory note, as it was not payable at all events; it was only a memorandum of having received a certain sum as a satisfaction *pro tanto* of an intended legacy.<sup>j</sup>(1)

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<sup>a</sup> *Hill v. Halford*, 2 B. & P. 413.

<sup>b</sup> *Dawkes v. Deloraine*, Bl. 782. 3 Wils. 207.

<sup>c</sup> *Palmer v. Pratt*, 2 Bing. 185. (9 Eng. C. L. 373.)

<sup>d</sup> *Williamson v. Bennett*, 2 Camp. 418.

<sup>e</sup> *Braham v. Bubb*, Coram Abbott, C. J., June, 1836. Chitt. 155.

<sup>f</sup> *Jenney v. Herle*, Lord Raym. 1361. Stra. 591.

<sup>g</sup> *Leeds v. Lancashire*, 2 Campb. 205.

<sup>h</sup> *Hartly v. Wilkinson*, 4 M. & S. 25. 4 Campb. 127.

<sup>i</sup> *Carlos v. Fancourt*, 5 T. R. 482.

<sup>j</sup> *Clark v. Percival*, 2 B. & Ad. 660. (22 Eng. C. L. 159.) Where the promise

(1) (An order drawn by a Contractor on a Post-Master General in the following words:

It is no objection that the time of payment be uncertain.

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But it is no objection to the validity of a note or bill of exchange, that the time of payment is uncertain or distant, provided the event on which it is made payable must inevitably happen, or be morally certain. As where *A.* promised to pay 50 guineas *ten days after the death of his father*, held, a negotiable instrument, for the event upon which it was to become payable, namely, the death of the father, *must happen* one time or another, though the period was uncertain.<sup>a</sup> So, where a promissory note was given to an infant, payable when he should become of age, namely, "on such a day in such a year;" held valid, for there was no condition or uncertainty.<sup>b</sup> So a note payable, "with interest twelve months after notice" is good, and may be proved under \*a commission of bankruptcy issued against the maker before notice had been given.<sup>c</sup> So, where the order was to pay one month after date to *A. B.* or order, a certain sum of money "as my quarterly half pay, to be due from the 24th of June, to the 27th of September next by advance;" held, a valid bill, because it was not payable out of a particular fund, or upon a contingency; it was made payable at all events, though the half pay might never become due; it was drawn on the general credit of the drawer.<sup>d</sup> So a note payable two months after a certain ship (in his Majesty's service,) should be paid off was held good; the paying off the ship being a thing of a public nature, it was morally certain that it would be paid off one time or another.<sup>e</sup> Bills of exchange, commonly called *billæ nundinales*, were always holden to be good, because, though these fairs were not always holden at a certain time, yet it was certain that they would be held.<sup>f</sup> An order from the *freighter* of a ship to pay money on account of freight, is good, because it is an admission that so much at

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was to pay 8l., "so much being to be due from me to *C. D.*, my landlady, at Ladyday next, who is indebted in that sum to *B. C.*," held good. Chitt. 159. So, where the promise was to pay a sum "being a portion of a value as under deposited in security for payment thereof." *Hausoulier v. Hartsink*, 7 T. R. 733.

<sup>a</sup> *Colehan v. Cooke*, Willes, 393. 2 Stra. 1217.

<sup>b</sup> *Goss v. Nelson*, 1 Burr. 226.

<sup>c</sup> *Clayton v. Gosling*, 5 B. & C. 360. (11 Eng. C. L. 252.)

<sup>d</sup> *M'Cleod v. Snee*, Stra. 762. Lord Ray. 1481.

<sup>e</sup> *Andrews v. Franklin*, Stra. 24, cited in Willes, 399.

<sup>f</sup> Willes, 399.

"Sir, on the first day of Jannary, 1836, pay to my order \$5,000, for value received, and charge the same to my account, for transporting the U. S. Mail, and oblige your friend, J. R.," was held not to be a negotiable bill of exchange, so as to entitle the holder to sue in his own name. *Reeside v. Knox*, 2 Wharton, 233. "An indispensable element in the constitution of these instruments is an absolute and entire freedom from contingency of payment depending on the happening of an event or the solvency of a fund. But in contemplation of law, is not every bill on government drawn on a fund, whether it be so expressed or not? It is a matter of public notoriety that government accepts for no more, and is bound for no more, whatever be the form of acceptance, than it has in its hands; and that it treats a bill drawn on it as no more than an assignment or order of transfer." "The public officers may doubtless draw or receive bills to facilitate the business of their departments; but they would transcend their power, did they attempt to pledge the responsibility of the government as a merchant or banker in the money market." Per Gibson, C. J. *Id.*)

least is due.<sup>a</sup> It has been decided, that a "note payable on the receipt of the payee's wages from his Majesty's ship the Suffolk," was good.<sup>b</sup> But this decision has, with good reason, been questioned; for though paying off the ship was morally certain, yet it was uncertain whether the maker would receive the wages.<sup>c</sup>

It is observable, that if an instrument be made payable on a contingency which may never happen, or out of a particular fund which may not be productive, it can never be enforced either as a bill of exchange or a note, even though the contingency on which it is made payable be afterwards reduced to a certainty by the happening of the event, or by the fund proving sufficient; because, if it be not a bill or note when \*drawn, no subsequent event can make it so.<sup>d</sup> But though such an instrument cannot be made available as a bill or note, the payee may, under such circumstances, sue the acceptor for money had and received; as where the bill was "to pay *M.* and *K.* or order, a certain sum out of the produce of goods you have of mine, now lying at Gibraltar, and as soon as the same shall come into your hands, after discharging the present acceptances," and which bill was accepted in these words, "I agree to conform to this order, *M. M.*" Held, that the payee was entitled to sue the acceptor for money had and received, and that the latter having accepted the bill, could not show as a defence, that he was overdrawn.<sup>e</sup> So, a bill payable out of a particular fund, when accepted, operates as an assignment, and will entitle the holder, at least in bankruptcy, to a claim on the acceptor.<sup>f</sup>

When the acceptor will be liable, though the instrument be not valid.  
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4.—*Payee.*] A bill or note, unless made payable to bearer, should describe the party in whose favor it is made, for any uncertainty respecting the payee may prevent it being sued upon as a bill or note. Where the promise in a note was "to pay *P. D.*, or plaintiffs, or his or their order;" held, not to be a note, because it was not payable in certain to *P. D.*, or the plaintiffs, but the claim of either, or of the indorsee of either, might be defeated by payment to the other.<sup>g</sup> So, where the form was, "I, *B. C.*, promise to pay *E. F.* the sum of 51*l.* or his order, at six months, &c., signed *B. C.*, or else *H. B.*;" held, not a note by *H. B.*, for it was an absolute undertaking on the part of *B. C.* to pay, and it was conditional only on the part of *H. B.* in the event of *B. C.* not paying.<sup>h</sup> Where a bill

A bill or note should specify to whom it is made payable.

<sup>a</sup> *Pierson v. Dunlop*, Cowp. 571. But an order from the owner of the ship to the freighter, to pay money on account of freight, is not a bill, because the quantum due on the freight may be open to litigation. *Banbury v. Liggett*, 2 Stra. 1211.

<sup>b</sup> *Evans v. Underwood*, 1 Wils. 262. <sup>c</sup> *Bayley*, 24.

<sup>d</sup> *Kingston v. Long*, Bayley, 16. *Colchan v. Cooke*, Willes, 399. See a very judicious and learned note on this point, in S. N. P. 384.

<sup>e</sup> *Maber v. Massias*, 2 Bl. 1072.

<sup>f</sup> *Chitty*, 795. *Ex parte Kirk*, 1 Atk. 108.

<sup>g</sup> *Blanckenhagen v. Blundell*, 2 B. & A. 417.

<sup>h</sup> *Ferris v. Bond*, 4 B. & A. 679. (6 Eng. C. L. 563.)



\*368 was drawn on the defendant, payable to one Henry Davis, and it got into the hands of another Henry Davis, who indorsed it to the plaintiff; held, that the indorsement \*was a forgery, and could convey no title to the plaintiff, for if any stranger had indorsed it in the same name, it would have conveyed no title, and it could make no difference whether such stranger bore the name of the payee or not.<sup>a</sup> If there be a father and son of the same name, it will be intended to be payable to the father until the contrary appear.<sup>b</sup> Where a bill was addressed to a particular house, but not to any particular person, and it was accepted by the defendant; held, that he could not object that it was not a bill.<sup>c</sup> A bill directed to *A.*, or in his absence to *B.*, being accepted by *A.*, may be declared on without noticing *B.*<sup>d</sup>

Where a forged bill was made payable to ——— or order; held, not sufficient; for, to constitute an order for the payment of money, there must be a payee, and here there was none, the forger was therefore acquitted.<sup>e</sup> But if it can be inferred from the tenor of the instrument who the intended payee is, it will be sufficient, though his name be not mentioned as such. As where the form of the note was, "Received of *A. B.* 100/., which I promise to pay on demand:" held, that it sufficiently designated *A. B.* as the payee.<sup>f</sup> When a blank is left for the name of the payee, a *bona fide* holder may insert his own name as payee, and declare on the instrument as if the name had been originally inserted.<sup>g</sup> But until the blank is filled up it is no note or bill.<sup>h</sup> A giving the payee a wrong description is immaterial if there be no doubt as to the person.<sup>i</sup>

\*369 If a note be made payable to *A.* or bearer, it is payable to the bearer, and the property in it passes by delivery; as where a draft upon a banker was made payable to ship \**Fortune*, or bearer; held, to be a negotiable instrument, on which the bearer might recover.<sup>j</sup>

Need not be made payable to order, or "to bearer." A bill or note need not be made payable to order or to bearer, but if it be not made to either, it must show who is to be the payee, and though it is not negotiable, still it is a valid security as between the original parties, and the property in it will pass to the personal representatives of the

<sup>a</sup> *Mead v. Young*, 4 T. R. 28, *dissentiente* Lord Kenyon.

<sup>b</sup> *Sweating v. Fowler*, 1 Stark. 106. (2 Eng. C. L. 316.)

<sup>c</sup> *Gray v. Milnor*, 8 Taunt. 739. (4 Eng. C. L. 264.)

<sup>d</sup> 12 Mod. 447. Byles, 49.

<sup>e</sup> *R. v. Richards*, 1 Russ. & Ry. 193. *R. v. Randall*, *id.* 195.

<sup>f</sup> *Green v. Davies*, 4 B. & C. 235. (10 Eng. C. L. 319.) *Chadwick v. Allen*, Stra. 706, S. P.

<sup>g</sup> *Crutchley v. Clarence*, 2 M. & S. 90. *Crutchley v. Mann*, 5 Taunt. 529. (1 Eng. C. L. 179.) *Attwood v. Griffin*, 1 R. & M. 26. (11 Eng. C. L. 351.)

<sup>h</sup> *Bayley*, 37. *R. v. Randall*, *supra*.

<sup>i</sup> *R. v. Box*, 6 Taunt. 325. *R. & R.* 300. (1 Eng. C. L. 401.)

<sup>j</sup> *Grant v. Vaughan*, 3 Burr. 1516. If a note be made payable to *A.* or order, it is negotiable by indorsement. *Bayley*, 37.

payee.<sup>a</sup> And if the payee indorses it, he thereby renders himself liable at the suit of the indorsee.<sup>b</sup> A promissory note payable to *M. M.* without the words "order or bearer," without any indication of the time of payment, has been held not to be a note payable to bearer on demand, and therefore not to require a stamp as such.<sup>c</sup> Declaration on a bill of exchange, drawn by *N.* on the defendant, requiring the defendant to pay "to his order," the sum therein mentioned, accepted by the defendant and indorsed by *N.* to the plaintiff; held, that the court could see that the word "his," referred to the drawer, and that there was no fatal ambiguity.<sup>d</sup>

If a bill be made payable to a fictitious person, and indorsed in the name of the fictitious payee, it is in effect a bill payable to bearer, and a *bond fide* holder, ignorant of that fact, may recover on it, against all prior parties who were privy to the fictitious transaction.<sup>e</sup> But if the holder, being cognisant that the payee was a fictitious person, discounted the bill for the drawer, he cannot afterwards recover on it against the acceptor.<sup>f</sup>

Fictitious parties.

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If the drawer and the payee be fictitious persons, the acceptor is liable to a *bond fide* holder, even though he was ignorant of the transaction being fictitious; for he ought to know the handwriting of the drawer, and therefore is precluded from disputing it; and though he might dispute the indorsement, where the drawer is a real person, yet the fair construction of his undertaking is, that he will pay for the signature of the same person that signed for the drawer. As where a bill was drawn in the name of a fictitious person, payable to the order of the drawer; held, that the acceptor was liable on it to a *bond fide* indorsee, and that the plaintiff might adduce evidence to show that the signature of the supposed drawer to the bill, and to the first indorsement, were in the same hand-writing.<sup>g</sup>

5.—*The drawer.*] The name of the drawer or maker of a bill or note should be inserted in the body of it, or subscribed by his name

<sup>a</sup> *Smith v. Kendall*, 6 T. R. 123. *R. v. Box*, 6 Taunt. 325. (1 Eng. C. L. 401.) *Bayley*. 34.

<sup>b</sup> *Hill v. Lewis*, Salk. 132.

<sup>c</sup> *Cheetam v. Butler*, 2 Nev. & M. 453. (28 Eng. C. L. 371.)

<sup>d</sup> *Spyer v. Thelwell*, 2 C. M. & R. 692. 1 Gale, 348.

<sup>e</sup> This point was strongly contested some years ago in several actions brought on bills negotiated with fictitious names, to the amount of one million sterling a-year, by the houses of Livesy & Co. and Gibson & Co.; the particulars of which will be found in the following cases:—*Gibson v. Hunter*, 2 H. Bl. 178-288. *Minet v. Gibson*, 3 T. R. 481. *Totlock v. Harris*, 3 T. R. 174. *Vere v. Lewis*, 3 T. R. 182. *Ex parte* the Royal Burghs of Scotland, 19 Ves. 311. *Bennett v. Farnell*, 1 Campb. 130. *Ex parte Clarke*, 3 Bro. C. C. 238. *Stone v. Freeland*, cited 1 H. Bl. 316. It seems that fraudulently indorsing a fictitious name on a bill, to give it currency, is forgery. See the preceding cases, and *Chitty on Bills*, 180.

<sup>f</sup> *Hunter v. Jeffery*, Peake, Add. 146.

<sup>g</sup> *Cooper v. Meyer*, 10 B. & C. 468. (21 Eng. C. L. 116.)

should appear. at the bottom. If the drawer writes it, his subscription to it is unnecessary; it is sufficient if his name appear in any part. "I, B. C., promise to pay," is as good as "I promise to pay," subscribed B. C.<sup>a</sup> The maker's name must be written by himself, or by some person authorised by him. Where a declaration alleged that the defendant made the note, and it was demurred to on the ground that it did not state that he signed it; but by the court, "if he did not either write or sign it, he did not *make* it, for making implies signing, and making is alleged."<sup>b</sup> The signature of a clerk who signs notes for the Bank of England, may be impressed by machinery.<sup>c</sup>

\*371 If a person sign his name to a paper having a bill stamp, and deliver it in blank to be filled up, he will be liable as drawer  
 Subscribing witness. \*for any sum afterwards inserted, to which the stamp is applicable.<sup>d</sup> Negotiable bills or notes under 5*l.*, and the indorsement thereof must be attested by a subscribing witness.<sup>e</sup> And whenever any bill or note is so attested, the subscribing witness must be called at the trial, or his absence must be duly accounted for.

Payment at a particular place. 6.—*Place of payment.*] If the drawer wishes to have the bill payable in any particular place, he may insert that place, either in the body of the bill or as a memorandum; if it be incorporated in the bill he cannot be charged, unless the bill be presented at such place.<sup>f</sup> But to render the acceptor liable it is not necessary, though it is sufficient to present the bill at the place directed by the drawer, unless the words "only and not otherwise or elsewhere," be appended to it.

For the 1 and 2 Geo. IV, c. 78, enacts, "that if any person shall accept a bill payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be taken to be to all intents and purposes a *general acceptance*; but if the acceptor shall in his acceptance express that he accepts the bill payable at a banker's or other place *only, and not otherwise or elsewhere*, it shall be a *qualified acceptance*, and he shall not be liable to pay it, except in default of payment after it shall have been *duly* demanded at such banker's house or other place."

This provision is confined to *acceptances* and does not apply to promissory notes. Therefore, if any place of payment be mentioned in the body of the note, it is part of the contract, and a presentment in such place is necessary, in order to charge

<sup>a</sup> Taylor v. Dobbins, Stra. 399. A man who cannot write may sign a bill by his mark, Highmore v. Primrose, 5 M. & S. 65.

<sup>b</sup> Elliott v. Cowper, Stra. 609. Lord Raym. 1376. Smith v. Jarvis, *id.* 1484. Erskin v. Murray, *id.* 1542.

<sup>c</sup> 1 G. IV, c. 92, s. 3.

<sup>d</sup> Collis v. Emett, 1 H. Bl. 313. Russell v. Langstaffe, Doug. 496. Snaith v. Mingay, 1 M. & S. 87. *Post*, 384.

<sup>e</sup> 17 G. III, c. 30, *ante*, 363.

<sup>f</sup> Gibbs v. Mather, 8 Bing. 214. (21 Eng. C. L. 277.) 2 C. & J. 254, *post*.

any party to it.<sup>a</sup> But if the place of payment be stated in a memorandum only, presentment to such place is unnecessary, as it is no part of the contract.<sup>b</sup> Yet where the place of payment was *printed* at the bottom, Lord Ellenborough held, that a special presentment at that place was necessary.<sup>c</sup> If the drawer of a bill makes it payable at his own house, it is *prima facie* evidence of it being an accommodation bill.<sup>d</sup> This subject will be found more fully considered under the head "Acceptances" and "Presentment for Payment."

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Notes payable to bearer on demand, if for less than 20/. must be made payable at the bank or place where issued, but they may be made payable at other places also.<sup>e</sup>

7.—*Value received.*] It was for some time a matter of controversy, whether it was not necessary that a bill or note should import to be for value received; it is now, however, settled, that it need not.<sup>f</sup> Mr. Chitty in his treatise on bills<sup>g</sup> states, that to entitle the holder of an inland bill or note for the payment of 20/. or upwards, to recover interest and damages against the drawer and indorser in default of acceptance or payment, it should contain the words "value received." But this doctrine is questioned by a very acute writer on the same subject.<sup>h</sup> It seems, however, that debt will not lie on a bill or note, unless the consideration be expressed.<sup>i</sup> Where a declaration in *debt* on a promissory note was demurred to on the ground of the omission of the words "value received" in the note, the court refused to set aside the demurrer as "frivolous."<sup>j</sup> The expression "value received," is capable of two interpretations, but the more natural one is, that the party who draws the bill would inform the drawee of a fact which he does not know than one of which he must be well aware, i. e. that he draws on him in favor of the payee, because he has received value of the payee.<sup>k</sup>

A bill or note need not contain the words "value received."

\*But the words "value received" in a bill made payable to the order of the drawer, imply value received by the acceptor.<sup>l</sup>

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<sup>a</sup> Roche v. Campbell, 3 Campb. 247. Hodge v. Fillis, *id.* 463. Sanderson v. Bowes, 14 East, 500.

<sup>b</sup> Williams v. Waring, 10 B. & C. 2. (21 Eng. C. L. 11.) Exon v. Russell, 4 M. & S. 505.

<sup>c</sup> Trecothick v. Edwin, 1 Stark. 468. (2 Eng. C. L. 470.) But this seems to have been overruled by the preceding case. Mr. Chitty puts a *quære* to it. Chitty, 175.

<sup>d</sup> Sharp v. Bailey, 9 B. & C. 44. (17 Eng. C. L. 329.)

<sup>e</sup> 7 Geo. IV, c. 6, s. 10.

<sup>f</sup> Bayley, 40. White v. Ledwich, *ib.* 4 Doug. 247. (24 Eng. C. L. 335.) Grant v. De Costa, 3 M. & S. 351.

<sup>g</sup> P. 183.

<sup>h</sup> Byles, 47.

<sup>i</sup> Bishop v. Young, 2 B. & P. 78. Priddy v. Henbrey, 1 B. & C. 674. (8 Eng. C. L. 179.) 3 D. & R. 165. (16 Eng. C. L. 160.)

<sup>j</sup> Creswell v. Crisp, 2 Dowl. P. C. 635.

<sup>k</sup> Per Lord Ellenborough, in Grant v. De Costa, 3 M. & S. 351.

<sup>l</sup> Highmore v. Primrose, 5 M. & S. 65.

The expression "value received," in a note, imports value received by the payee.<sup>a</sup>

**Place to account.** The direction to place a bill to account is unnecessary.<sup>b</sup> The words "as per advice," are sometimes used in a bill; when they are, the drawee is not justified in paying before he has received advice.<sup>c</sup>

**The date is not essential.** 8.—*Date.*] It is usual to insert the date, but it is not essential to the validity of a bill or note, unless it be for between 20s. and 5*l.*, and made in England.<sup>d</sup> *Notes payable to bearer* on demand, shall not have printed dates under a penalty of 50*l.*<sup>e</sup> A bill or note is *prima facie* made on the day it bears date; at least, as between the original parties to it.<sup>f</sup> It is no objection to a bill or note that it is dated on a Sunday.<sup>g</sup> A bill or note may be post dated;<sup>h</sup>(1) but if done to evade the higher scale of stamp duties, by postponing the time of payment for more than two months, or sixty days from the time it is issued, it will subject the party to a penalty of 100*l.*<sup>i</sup>

**Effect of a memorandum on a bill or note** 9.—*Memorandum.*] A memorandum made on a bill or note, before the instrument is completed, is sometimes construed as part of the contract, so as to control its operation.<sup>(2)</sup>

As where a memorandum was indorsed on a note before it was signed in these words: "This note is given on condition that if any dispute shall arise between Mr. H. and Lady W., respecting the fir, this note to be void:" held, to control the operation of the note, and as the payment was thereby rendered contingent, the note was void.<sup>j</sup> But where there was a memorandum at the bottom of the note, making it payable "at Messrs. Brown and Co., bankers, London;" held, that it was no \*374 part of the note, and that it was a misdescription to state it in the declaration as part of the legal effect of the note.<sup>k</sup> So where the memorandum merely intimated a desire that if the defendant wished for more time he should have it without suit at law, until three years after the payee's death. This was indorsed, on the note, and Lord Ellenborough said, that even if incorporated, they were words of mere indulgence and favor.<sup>l</sup>

<sup>a</sup> Clayton v. Gosling, 5 B. & C. 360. (11 Eng. C. L. 252.)

<sup>b</sup> Laing v. Barclay, 1 B. & C. 398. (8 Eng. C. L. 108.)

<sup>c</sup> Chitty, 185.

<sup>d</sup> 17 Geo. III, c. 30, ante, 363.

<sup>e</sup> 55 Geo. III, c. 184, s. 18.

<sup>f</sup> Taylor v. Kinloch, 1 Stark. 175. See Williams v. Jarrett, post, 386.

<sup>g</sup> Begbie v. Levy, 1 C. & J. 180. 1 Tyr. 130, ante, 16.

<sup>h</sup> Passmore v. North, 13 East, 517.

<sup>i</sup> 55 Geo. III, c. 184, s. 12.

<sup>j</sup> Hartley v. Wilkinson, 4 Camp. 127, ante, 365.

<sup>k</sup> Exon v. Russell. 4 M. & S. 505.

<sup>l</sup> Stone v. Metcalf, 4 Camp. 217. 1 Stark. 53. (2 Eng. C. L. 292.) See Wise v. Charleton, 2 Har. & W. 49. 6 N. & M. 364, post.

(1) (Mohawk Bank v. Broderick, 10 Wend. 304. 13 Wend. 133. Brewster v. McCordell, 8 Wend. 478. Gough v. Staats, 13 Wend. 549.)

(2) (Heywood v. Perrin, 10 Pick. 228.)

So where the memorandum in the margin was "accepted on myself, payable every where;" held, that they constituted no part of the original instrument; they were merely an acknowledgment of the sight of the note, and though they were contemporaneous with the note, their effect was in point of law subsequent.<sup>a</sup> If the memorandum be written after the instrument is completed, it forms no part of the instrument, even though it be on the same paper, and it cannot be admitted in evidence without an agreement stamp.<sup>b</sup>

A memorandum, though on a separate piece of paper, if made contemporaneous with the bill or note, is admissible between the original parties and their representatives; as where there was an agreement to renew written on a separate piece of paper, it was held to qualify the liability.<sup>c</sup> But *parol* evidence of an agreement that the note was not to be put in suit until a given event happened, is not admissible, for the effect of it would be to contradict by *parol* the note itself.<sup>d</sup>(1)

Effect of a distinct memorandum relating to a bill or note

Where an agreement was entered into in writing between *A.* and *B.*, that *A.* should do certain acts, and that *B.* should give a promissory note, payable on demand, by way of security for the payment of a certain sum in a certain event. The note having been given, a memorandum was indorsed on it after it had been signed, stating that the note was given upon the condition mentioned in the agreement; held, that this indorsement was to be \*considered as merely marking the note for the purpose of satisfaction, and not as incorporating the agreement so as to render the note an agreement or a conditional promise.<sup>e</sup> \*375

10.—*The usual forms.*] The following are the usual forms of a foreign and inland bill of exchange and promissory note, as given in Chitty on bills:—

#### FORM OF A FOREIGN BILL.

London, 1st January, 1837.

Exchange for 10,000 livres tournoises.

(*Stamp.*)

At two usances [*or* at — after sight, *or* after date, *or* at sight, at Versailles,] pay this my first bill of exchange,

<sup>a</sup> Splitgerber v. Kohn, 1 Stark. 125. (2 Eng. C. L. 323.)

<sup>b</sup> Per Lord Ellenborough, in Stone v. Metcalf, *supra*.

<sup>c</sup> Bowerbank v. Monteiro, 4 Taunt. 844.

<sup>d</sup> Moseley v. Hanford, 10 B. & C. 729, (21 Eng. C. L. 156,) *post*. Every bill or note imports two things, value received and an engagement to pay the amount on certain specified terms. Evidence is admissible to deny the receipt of value, but not to vary the engagement. Per Parke, J., *id*.

<sup>e</sup> Brill v. Cock, 1 Mees. & W. 232. 1 Gale, 441. nom. Brill v. Crick.

(1) (Nor that the note was to be given up on the happening of a certain event. Spring v. Lovett, 11 Pick. 420. An indorsement cannot be shown by *parole* evidence to have been intended as a guarantee. Fuller v. McDonald, 8 Greenleaf, 213.)



(second and third of the same tenor and date not paid,) to Messrs. ——— or order, (or bearer,) ten thousand livres tournoises, value received of them, and place the same to account as per advice from

JAMES OATLAND.

To Messrs. ———, in Paris, }  
payable at Versailles. }

Au besoin chez Messrs. ——— *retour sans protêt.*

Re-exchange, interest and expenses, not to exceed

(Witness) JAMES ATKINSON.

#### FORM OF AN INLAND BILL.

London, 1st January, 1837.

£100.

(Stamp.) Two months after date, [or at sight, or on demand,] pay Mr. ———, or order, one hundred pounds for value received.

SAMUEL SKINNER.

To Mr. ———, Merchant, }  
Bristol, payable at ———. }

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#### \*FORM OF A PROMISSORY NOTE.

London, 1st January, 1837.

£100.

(Stamp.) Two months after date, I promise to pay Mr. ——— or order, one hundred pounds for value received.

HENRY JONES.

#### FORM OF A BILL UNDER FIVE POUNDS.

[Here insert the place, day of the month and year, when and where made.]

Two months after date, pay to *A. B.*, of ———, or his order, the sum of ———, value received by

*G. H.*

To *E. F.*, of ———, }  
Witness, *R. S.* }

SECTION IV.

OF THE STAMP.

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1.—*The Stamp acts.*] THE paper, vellum, or parchment on which a bill or note is written must, with a few exceptions which shall be noticed hereafter, be duly stamped, *before the bill or note is written*, otherwise it will not be available, either in a court of law or equity.\* The scale of duties is at present fixed by the 55 Geo. III, c. 184, as follows:

Inland bill of exchange, draft, or order to the bearer, or to order, either on demand or otherwise, not exceeding two \*months after date, or sixty days after sight, of any sum of money— \*377

	£	s.	d.
Amounting to 40s., and not exceeding 5 <i>l.</i> 5s.	0	1	0
Exceeding 5 <i>l.</i> 5s., not exceeding 20 <i>l.</i> . .	0	1	6
Exceeding 20 <i>l.</i> , not exceeding 30 <i>l.</i> . .	0	2	0
Exceeding 30 <i>l.</i> , not exceeding 50 <i>l.</i> . .	0	2	6
Exceeding 50 <i>l.</i> , not exceeding 100 <i>l.</i> . .	0	3	6
Exceeding 100 <i>l.</i> , not exceeding 200 <i>l.</i> . .	0	4	6
Exceeding 200 <i>l.</i> , not exceeding 300 <i>l.</i> . .	0	5	0
Exceeding 300 <i>l.</i> , not exceeding 500 <i>l.</i> . .	0	6	0
Exceeding 500 <i>l.</i> , not exceeding 1,000 <i>l.</i> . .	0	8	6
Exceeding 1,000 <i>l.</i> , not exceeding 2,000 <i>l.</i> . .	0	12	6
Exceeding 2,000 <i>l.</i> , not exceeding 3,000 <i>l.</i> . .	0	15	0
Exceeding 3,000 <i>l.</i> . . . . .	1	5	0

Inland bill of exchange, draft, or order for the payment to the bearer, or to order, at any time exceeding two months after date, or sixty days after sight, of any sum of money—

Amounting to 40s., and not exceeding 5 <i>l.</i> 5s.	0	1	6
Exceeding 5 <i>l.</i> 5s., not exceeding 20 <i>l.</i> . .	0	2	0
Exceeding 20 <i>l.</i> , not exceeding 30 <i>l.</i> . .	0	2	6
Exceeding 30 <i>l.</i> , not exceeding 50 <i>l.</i> . .	0	3	6
Exceeding 50 <i>l.</i> , not exceeding 100 <i>l.</i> . .	0	4	6
Exceeding 100 <i>l.</i> , not exceeding 200 <i>l.</i> . .	0	5	0
Exceeding 200 <i>l.</i> , not exceeding 300 <i>l.</i> . .	0	6	0
Exceeding 300 <i>l.</i> , not exceeding 500 <i>l.</i> . .	0	8	6
Exceeding 500 <i>l.</i> , not exceeding 1,000 <i>l.</i> . .	0	12	6
Exceeding 1,000 <i>l.</i> , not exceeding 2,000 <i>l.</i> . .	0	15	0
Exceeding 2,000 <i>l.</i> , not exceeding 3,000 <i>l.</i> . .	1	5	0
Exceeding 3,000 <i>l.</i> . . . . .	1	10	0

Inland bill, draft, or order for the payment of any sum of money, though not made payable to the bearer, or to order, if the same shall be delivered to the payee, or some person on his or her behalf—the same duty as on a bill of exchange for the like sum, payable to bearer or order.

**\*378** Inland bill, draft, or order for the payment of any sum of money, weekly, monthly, or at any other stated periods, if made payable to the bearer, or to order, or if delivered to the payee, or some person on his or her behalf, where the total amount of \*the money thereby made payable shall be specified therein, or can be ascertained therefrom—the same duty as on a bill payable to bearer or order on demand, for a sum equal to such total amount.

And, where the total amount of the money thereby made payable shall be indefinite—the same duty as on a bill on demand, for the sum therein expressed only.

And the following instruments shall be deemed and taken to be inland bills, drafts, or orders, for the payment of money, within the intent and meaning of this schedule; viz:—

All drafts or orders for the payment of any sum of money, by a bill or promissory note, or for the delivery of any such bill or note, in payment or satisfaction of any sum of money, where such drafts or orders shall require the payment or delivery to be made to the bearer, or to order, or shall be delivered to the payee, or some person on his or her behalf.

All receipts given by any banker or bankers, or other person or persons, for money received, which shall entitle, or be intended to entitle, the person or persons paying the money, or the bearer of such receipts, to receive the like sum from any third person or persons.

And all bills, drafts, or orders, for the payment of any sum of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer, or to order, or if the same shall be delivered to the payee, or some person on his or her behalf.

Foreign bills of exchange, (or bill of exchange drawn in but payable out of Great Britain,) if drawn singly, and not in a set—the same duty as on an inland bill of the same amount and tenor.

Foreign bills of exchange, drawn in sets, according

to the custom of merchants, for every bill of each

set, where the sum made payable thereby shall not £ s. d.  
exceed 100/. . . . . 0 1 6

And where it shall exceed 100/., and not exceed 200/. 0 3 0

Where it shall exceed 200/., and not exceed 500/. . 0 4 0

Where it shall exceed 500/., and not exceed 1,000/. 0 5 0

Where it shall exceed 1,000/., and not exceed 2,000/. 0 7 6

**\*379** \*Where it shall exceed 2000/., and not exceed 3000/. 0 10 0

Where it shall exceed 3000/. . . . . 0 15 0

*Exemptions from the preceding and all other stamp du-*

*ties.*] All bills of exchange, or bank-post bills, issued by the governor and company of the Bank of England.

All bills, orders, remittance-bills, and remittance certificates, Bills drawn by commissioned officers, masters, and surgeons in the navy, or by any commissioner or commissioners of the navy, under the authority of the act passed in the thirty-fifth year of his majesty's reign for the more expeditious payment of the wages and pay of certain officers belonging to the navy. drawn by certain navy officers

All bills drawn pursuant to any former act or acts of parliament, by the commissioners of the navy, or by the commissioners for victualling the navy, or by the commissioners for managing the transport service, and for taking care of sick and wounded seamen, upon, and payable by, the treasurer of the navy.

All drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers or any person or persons acting as a banker, who shall reside, or transact the business of a banker, within ten miles<sup>a</sup> of the place where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders, and provided the same shall bear date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes. Checks on bankers.

All bills for the pay and allowances of his majesty's land forces, or for other expenditures liable to be charged in the public regimental or district accounts, which shall be drawn according to the forms now prescribed, or hereafter to be prescribed, by his majesty's orders, by the paymasters of regiments or corps, or by the chief paymaster, or deputy paymaster, and accountant of the army depot, or by the paymasters of recruiting districts, or by the paymasters of detachments, or by the \*officer or officers authorised to perform the duties of the paymastership during a vacancy, or the absence, suspension, or incapacity, of any such paymaster, as aforesaid; save and except such bills as shall be drawn in favor of contractors, or others, who furnish bread or forage to his majesty's troops, and who, by their contracts or agreements, shall be liable to pay the stamp duties on the bills given in payment for the articles supplied by them. Army bills.

Promissory note, for the payment, to the bearer on demand of any sum of money—

Not exceeding 1 <i>l.</i> 1 <i>s.</i> . . . . .	0	0	5
Exceeding 1 <i>l.</i> 1 <i>s.</i> , not exceeding 2 <i>l.</i> 2 <i>s.</i> . . . . .	0	0	10
Exceeding 2 <i>l.</i> 2 <i>s.</i> , not exceeding 5 <i>l.</i> 5 <i>s.</i> . . . . .	0	1	3
Exceeding 5 <i>l.</i> 5 <i>s.</i> , not exceeding 10 <i>l.</i> . . . . .	0	1	9
Exceeding 10 <i>l.</i> , not exceeding 20 <i>l.</i> . . . . .	0	2	0
Exceeding 20 <i>l.</i> , not exceeding 30 <i>l.</i> . . . . .	0	3	0

<sup>a</sup> Extended to 15 miles by 9 Geo. IV, c. 49, s. 15. To bring a check within the exemption, it must be drawn on a *banker*, *Castleman v. Ray*, 2 B. & P. 383, and specify the place where drawn, *Waters v. Brogden*, 1 Y. & J. 457.

Exceeding 30*l.*, not exceeding 50*l.* . . . 0 5 0

Exceeding 50*l.*, not exceeding 100*l.* . . . 0 8 6

Which said notes may be re-issued, after payment thereof, as often as shall be thought fit.

Promissory note for the payment, in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight, of any sum of money—

Amounting to 40*s.*, and not exceeding 5*l.* 5*s.* 0 1 0

Exceeding 5*l.* 5*s.*, not exceeding 20*l.* . . . 0 1 6

Exceeding 20*l.*, not exceeding 30*l.* . . . 0 2 0

Exceeding 30*l.*, not exceeding 50*l.* . . . 0 2 6

Exceeding 50*l.*, not exceeding 100*l.* . . . 0 3 6

These notes are not to be re-issued after being once paid.

Promissory note for the payment, either to the bearer on demand, or in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight, of any sum of money—

Exceeding 100*l.*, not exceeding 200*l.* . . . 0 4 6

Exceeding 200*l.*, not exceeding 300*l.* . . . 0 5 0

Exceeding 300*l.*, not exceeding 500*l.* . . . 0 6 0

Exceeding 500*l.*, not exceeding 1000*l.* . . . 0 8 6

Exceeding 1000*l.*, not exceeding 2000*l.* . . . 0 12 6

\*381 Exceeding 2000*l.*, not exceeding 3000*l.* . . . 0 15 0

Exceeding 3000*l.* . . . . . 1 5 0

These notes are not to be re-issued after being once paid.

Promissory note for the payment, to the bearer or otherwise at any time exceeding two months after date, or sixty days after sight, of any sum of money—

Amounting to 40*s.*, and not exceeding 5*l.* 5*s.* 0 1 6

Exceeding 5*l.* 5*s.*, not exceeding 20*l.* . . . 0 2 0

Exceeding 20*l.*, not exceeding 30*l.* . . . 0 2 6

Exceeding 30*l.*, not exceeding 50*l.* . . . 0 3 6

Exceeding 50*l.*, not exceeding 100*l.* . . . 0 4 6

Exceeding 100*l.*, not exceeding 200*l.* . . . 0 5 0

Exceeding 200*l.*, not exceeding 300*l.* . . . 0 6 0

Exceeding 300*l.*, not exceeding 500*l.* . . . 0 8 6

Exceeding 500*l.*, not exceeding 1000*l.* . . . 0 12 6

Exceeding 1000*l.*, not exceeding 2000*l.* . . . 0 15 0

Exceeding 2000*l.*, not exceeding 3000*l.* . . . 1 5 0

Exceeding 3000*l.* . . . . . 1 10 0

These notes are not to be re-issued after being once paid.

Promissory note for the payment of any sum of money by instalments, or for the payment of several sums of money at different days or times, so that the whole of the money to be paid shall be definite and certain—the same duty as on a promissory note payable in less than two months after date, for a sum equal to the whole amount of the money to be paid.

And the following instruments shall be deemed and taken to be promissory notes, within the intent of this schedule; viz:—

All notes promising the payment of any sum or sums of money out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen; if the same shall be made payable to the bearer or to order, and if the same shall be definite and certain, and not amount in the whole to 20/.

And all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum, importing that interest shall be paid for the money so deposited.

*Exemptions from the duties on promissory notes.]* All notes, promising the payment of any sum or sums of money, out of any particular fund which may or may not be available; or \*upon any condition or contingency, which may or may not be performed or happen; where the same shall not be made payable to the bearer or to order, and also where the same shall be made payable to the bearer or to order, if the same shall amount to 20/., or be indefinite. \*382

And all other instruments, bearing in any degree the form or style of promissory notes, but which in law shall be deemed special agreements except those hereby expressly directed to be deemed promissory notes.

But such of the notes and instruments here exempted from the duty on promissory notes shall nevertheless be liable to the duty which may attach thereon, as agreements or otherwise.

A bill or note stamped with a stamp of a wrong denomination may, if the same be of *equal or superior* value to the stamp required, be stamped with the proper stamp, by the commissioners on payment of the proper duty, and 40s. if the bill be not due, or 10/ if due.<sup>a</sup> Every instrument bearing a stamp of greater value than the stamp required by law is valid if the stamp be of the proper denomination.<sup>b</sup> Stamp of a wrong denomination.

Every instrument impressed with a stamp of an *improper denomination* but of *equal or greater* value than the proper stamp, is valid, unless such stamp shall have been specially appropriated to some other instrument, by having its name on the face.<sup>c</sup>

*Penalties.]* If any person shall make or issue any check or draft on a banker payable to bearer on demand, and not duly stamped, and not falling in every respect within the exception, the drawer shall forfeit 100/., the banker *knowingly* paying it 100/., and any person *knowingly* taking it 20/. And the banker shall not be allowed it in account against any person by whom or for whom it is drawn.<sup>d</sup> Penalty on unstamped instruments.

<sup>a</sup> 37 Geo. III, c. 136, s. 5, "This is a clear legislative declaration, that it is not sufficient that a certain sum of money be paid on the instruments which are the subject of taxation, but the stamp used must be of the proper denomination." Per Sir James Mansfield, C. J., in *Chamberlain v. Porter*, 1 N. R. 33.

<sup>b</sup> 43 Geo. III, c. 127, s. 6.

<sup>c</sup> 55 Geo. III, c. 184, s. 10.

<sup>d</sup> 55 Geo. III, c. 184, s. 13.



\*383 Where the holder of a check, which he knew to be *post dated*, and who also knew that the drawer was insolvent obtained \*payment from the banker, who had no funds of the drawer's in his hands at the time; held, that the banker might recover the sum paid from the person so presenting the check.<sup>a</sup>

Any person making, issuing, accepting, or paying any bill of exchange or promissory note, liable to any of the duties imposed by the above act, without the same being duly stamped, is liable to a penalty of 50l.<sup>b</sup>

Issuing re-issuable notes without a license subjects the party to the penalty of 100l.<sup>c</sup>

2.—*Stamp on a foreign bill.*] Bills or notes made in any part of the *dominions of the crown of England*, cannot be made available in any court in this country, unless stamped according to the law of the place where they were made.<sup>d</sup> But bills or notes drawn or made in a foreign independent state, (except notes payable to bearer on demand,) do not require *any stamp* in order to their validity in this country, for no country ever takes notice of the revenue laws of another country. There is no reciprocity between nations in this respect. "It would," said Abbott, C. J., "be productive of prodigious inconvenience if, in every case in which an instrument was executed in a foreign country, we were to receive in evidence what the law of that country was, in order to ascertain whether the instrument was or was not valid."<sup>e</sup>

A note payable to bearer on demand made out of Great Britain (except where made and payable in Ireland only) cannot be negotiated, taken or offered in payment, or paid in this country, unless it be stamped in like manner as notes of the same tenor and value made in Great Britain, under a penalty of 20l.<sup>f</sup>

\*384 Bill signed in Ireland. \*3.—*What shall be deemed a foreign bill.*] Where partners residing in Ireland, signed and indorsed a copper-plate impression of a bill of exchange having an Irish stamp on it, leaving blanks for the date, sum, time when payable, and the name of the drawee, and transmitted it to a member of their firm, who carried on business in England, to be used by him, and he filled it up and used it accordingly; held, that it did not require an English stamp, for it was *bond fide* signed in Ireland; it therefore was to be considered as made there.<sup>g</sup> So where a

<sup>a</sup> *Martin v. Morgan*, Gow. 123. (5 Eng. C. L. 484.) 3 Moore, 635. See *Allen v. Keeses*, 1 East, 435. *Whitwell v. Bennett*, 3 B. & P. 359.

<sup>b</sup> 55 Geo. III, c. 184, s. 11.

<sup>c</sup> *Id.* s. 27.

<sup>d</sup> *Alves v. Hodgson*, 7 T. R. 241. *Clegg v. Levy*, 3 Campb. 166.

<sup>e</sup> *James v. Catherwood*, 3 D. & R. 190. (16 Eng. C. L. 165.) *Holman v. Johnson*, Cowp. 341. *Boucher v. Lawrence*, Cas. temp. Hard. 198. *Clugas v. Penaluna*, 4 T. R. 466. *Pellecat v. Angell*, 2 C. M. & R. 311, ante, 17.

<sup>f</sup> 55 Geo. III, c. 184, s. 29.

<sup>g</sup> *Snaith v. Mingay*, 1 M. & S. 87.

bill, of which a person residing at Antwerp was intended to be drawer, was sketched out and accepted in this country, and then transmitted to Antwerp to be signed by the drawer; held, to be a foreign bill, which did not require an English stamp; for it was to be considered as made where it was drawn, and that was at Antwerp, where the drawer signed it.<sup>a</sup> So where a bill was drawn in Jamaica on a stamp of that island only, and a blank was left for the payee's name; held, that an English stamp was not necessary to enable a *bond fide* holder, who inserted his own name as payee, to sue upon it in England.<sup>b</sup>

Signed by  
the draw-  
er at Ant-  
werp.

Drawn in  
Jamaica.

Where in an action on a bill of exchange, purporting to be drawn by *A.* abroad, on *B.* resident in England, a witness proved that he saw the drawer with the bill in his possession abroad, the day after the date of it; held, sufficient evidence of its being a foreign bill, without showing that it was abroad in an unaccepted state.<sup>c</sup>

If in an action on a bill purporting to be made abroad, and not having an English stamp, the defence be, that it was made in England, there ought to be clear and distinct evidence of that fact; for drawing in England with a foreign date to evade the stamp duty is a very serious offence. In an action on a bill of exchange, dated Paris, 1st March, in support of a defence that it was drawn in London, evidence was given to show that the drawer was in London on the 3d of March; held, not sufficient, for it might possibly have been drawn in Paris on the 1st of March, and even if it was proved not to have been drawn on that day, it did not follow that it was not drawn there at some other time, or that it was drawn in England.<sup>d</sup> But if the fact of it being made in England be distinctly proved, it will prevent even a *bond fide* holder from recovering on it;<sup>e</sup> and evidence <sup>\*is</sup> admissible to show that such a bill was in fact drawn in England.<sup>f</sup> A bill of exchange drawn in England upon a person abroad, but accepted by him, payable in England, is an inland bill, and requires a stamp as such.<sup>g</sup>

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4.—*Construction of the Stamp Act.*] The stamp duty is to be imposed on the principal sum mentioned in the note, and not on a sum compounded of principal and interest.<sup>h</sup> A bill payable at *sight* is not to be considered as a bill payable *on demand*, so as to be exempt from duty under the stamp act, 23 Geo. III, c. 49, s. 4, in favor of bills payable on demand,

<sup>a</sup> Boehm v. Campbell, Gow. 56. (5 Eng. C. L. 460.) 8 Taunt. 679. (4 Eng. C. L. 245.)

<sup>b</sup> Crutchley v. Mann, 5 Taunt. 529. (1 Eng. C. L. 179.)

<sup>c</sup> Dempilliers v. Holden, 2 Gale, 394.

<sup>d</sup> Abraham v. Dubois, 4 Camp. 269. Biré v. Moureau, 2 C. & P. 376. (12 Eng. C. L. 180.)

<sup>e</sup> *Ex parte* Manners, 1 Rose, 68.

<sup>f</sup> Jordaine v. Lashbrooke, 7 T. R. 301.

<sup>g</sup> Amner v. Clarke, 2 C. M. & R. 468. 1 Gale, 191.

<sup>h</sup> Pruessing v. Ing, 4 B. & A. 204. (6 Eng. C. L. 402.) Wills v. Nott, 4 Tyr. 726.

What instrument is within the second class in the schedule.

three days of grace being allowed.<sup>a</sup> A note payable two months *after sight*, requires the same stamp as a bill exceeding sixty days after sight, if those two months, exclusive of the days of grace, exceed sixty days after sight.<sup>b</sup> A note payable to the payee or order on demand, is within the description in the second class of notes mentioned in the schedule of a note payable *in another manner* than to *bearer* on demand, and also not exceeding *two months after date*, or *sixty days after sight*. It being objected that it might or might not be payable two months after date, the court answered, that it could not be said when it was given, that it would exceed two months, &c.; and the higher rate of duty was confined to those notes *which necessarily exceeded two months*. The rate of duty was to be fixed at the time of giving the note, and the subject could not be charged beyond what would then be the correct rate. The payee might demand the money as soon as the note was given.<sup>c</sup> So where a joint note was made payable to *J. G. or order*, on demand; held, to be within this class.<sup>d</sup>

**\*386** *First class* A note payable to bearer on demand is within the first class, (see schedule.) It has been held, that a note payable to *W.* or bearer, without the words *on demand*, was in law payable on *demand*, and, therefore, within the first class.<sup>e</sup> But a note payable to *A. B.* generally, is not one payable to *bearer* on demand, and, therefore, not within the *first*, but within the second class.<sup>f</sup>

*Date.* The word "date" in the schedule, part 1,<sup>g</sup> was intended to denote the period of payment expressed on the face of the bill itself, not the time when the bill actually issued. Therefore, where a bill was post dated, so as in fact not to be payable until upwards of two months after it was issued, though it purported to be payable in two months, and bore the inferior stamp corresponding with the purport of the bill; held, that a *bond fide* holder might recover on it against the drawer, though the party so post dating it was liable to a penalty of 100*l.* "If a bill bears no date," said Lord Denman, "we must ascertain, by evidence, the day when it issued; but where there is a date, that must be considered as the time to which the schedule refers."<sup>h</sup> A note for 200*l.*, with lawful interest re-

<sup>a</sup> *Anson v. Thomas*, Bayley, 98.

<sup>b</sup> *Sturdy v. Henderson*, 4 B. & A. 592. (6 Eng. C. L. 530.)

<sup>c</sup> *Moyser v. Whittaker*, 9 B. & C. 409. (17 Eng. C. L. 408.)

<sup>d</sup> *Armitage v. Berry*, 5 Bing. 501. (15 Eng. C. L. 518.) It was decided in *Keates v. Whieldon*, 8 B. & C. 7, (15 Eng. C. L. 144,) that a note payable on demand to *J. K.*, (omitting or order or bearer,) was not within the second class; but the validity of that decision was questioned in *Moyer v. Whittaker*; there is a quære to it in Bayley, 99; and it has been expressly overruled in *Cheetham v. Butler*, *infra*, 386.

<sup>e</sup> *Whitlock v. Underwood*, 2 B. & C. 157. (9 Eng. C. L. 51.)

<sup>f</sup> *Cheetham v. Butler*, 5 B. & Ad. 837. (27 Eng. C. L. 206.) 2 Nev. & M. 453. *Dixon v. Chambers*, 1 Gale, 14. 1 C. M. & R. 845.

<sup>g</sup> *Ante*, 377.

<sup>h</sup> *Williams v. Jarrett*, 5 B. & Ad. 32. (27 Eng. C. L. 26.) 2 N. & M. 49. *Upstone v. Marchant*, 2 B. & C. 10. (9 Eng. C. L. 7.) *Peacock v. Murrell*, 2 Stark.

served from a day prior to the date, requires a stamp applicable to a note for 200*l.* only.<sup>a</sup>

The 31 Geo. III, c. 25, s. 19, prohibits the commissioners from stamping any bill or note after it has been made; subsequent enactments authorised the commissioners to stamp such instruments after they have been made under certain circumstances which have been already noticed.<sup>b</sup> If, however, the commissioners stamp bills which by law they are not authorised to stamp, the circumstance of those officers having transgressed their duty will not prevent a *subsequent* indorsee from recovering on it, provided there be nothing on the face of it to show that it was not duly stamped at the time that it was issued.<sup>c</sup> Instruments payable on a contingency, or out of a particular \*fund, which may not be productive, and which, therefore, cannot be deemed bills or notes,<sup>d</sup> must nevertheless have the stamps appropriated to bills or notes, in order to be available in a court of justice.<sup>e</sup> As where *A.* directed *B.*, by letter, to pay *C.* 1,500*l.* out of the proceeds of certain unsold goods of *A.* in *B.*'s hands, and *B.* in letters to *C.* agreed to do so, which letter had an agreement stamp; held, that it was not an agreement, and that *A.*'s letter should have a bill stamp, as ordering money to be paid out of a *particular fund*.<sup>f</sup> But where *A.* ordered *B.* to pay to *C.* "the proceeds of a shipment of goods value *about* 2,000*l.*, consigned by me to you," and *C.* consented in writing; held, that neither of these letters required a bill stamp, for the order was not for a *specific* amount.<sup>g</sup>

Effect of  
post  
stamping.

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5.—*Effect of want of a stamp.*] The 31 G. III, c. 25, s. 19, enacts, that "no bill or note liable to the stamp duties shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity, unless duly stamped." Therefore where the defendant had indorsed a bill to the plaintiff, on an insufficient stamp, for goods sold, and the plaintiff had neglected to present it for payment; and the defendant proved that it would have been paid by the acceptor, if it had been presented; held, that the plaintiff's laches did not discharge the defendant, as the defect in the stamp precluded the defendant from having the bill considered as payment.<sup>h</sup> The rule respecting the inadmissibility in evidence of a note or bill not duly stamped, is so strictly observed, that even

A bill or  
note not  
duly  
stamped,  
cannot be  
received  
in evi-  
dence.

558. (3 Eng. C. L. 474.) *Johnson v. Gannett*, 2 Chitty, Rep. 122. (18 Eng. C. L. 272.) And see *Doe v. Lewis*, 10 B. & C. 673. (21 Eng. C. L. 146.)

<sup>a</sup> *Wills v. Nott*, 4 Tyr. 726.

<sup>b</sup> *Ante*, 382.

<sup>c</sup> *Wright v. Riley*, Peake, 173. *Green v. Davies*, 4 B. & C. 235. (10 Eng. C. L. 319.)

<sup>d</sup> See *ante*, 363.

<sup>e</sup> See schedule, part 1, *ante*, 378.

<sup>f</sup> *Fairbank v. Bell*, 1 B. & A. 36. *Butts v. Swann*, 2 B. & B. 78. (6 Eng. C. L. 28.) See *Wise v. Charlton*, *ante*, 374.

<sup>g</sup> *Jones v. Simpson*, 2 B. & C. 318. (9 Eng. C. L. 99.)

<sup>h</sup> *Wilson v. Vysar*, 4 Taunt. 288.

the jury is not allowed to look at such an instrument, with a view to enable them to form an opinion respecting the claim of the party suing on it. As where it was agreed between the drawer and acceptor of a bill, that the former should take a second acceptance at six months in lieu of payment, and the second bill was drawn on the back of the first, the latter having been cancelled; held, in an action on the first, that the jury could not look at the second, to judge whether the first had been cancelled with \*the consent of the drawer, because it was not stamped;<sup>a</sup> and in a subsequent case, where the question was, whether the jury could look at the indorsement of a bill to ascertain whether the plaintiff was the indorsee, Lord Tenterden, in delivering the judgment of the court, said, that an unstamped bill, or one improperly stamped, *cannot be read to the jury* as evidence of the contract, or any part of it, in respect of which the plaintiff sues. Such an instrument may be looked at by the court, for the purpose of seeing whether it requires a stamp, or is properly stamped; that being part of the duty of judges, with which the jury have nothing to do, and of which they are supposed to take no cognizance.<sup>b</sup>

**Want of a proper stamp need not be pleaded** Where an unstamped check was read in evidence, without objection, and it afterwards appeared to have been post dated; held, that the evidence should be struck out of the judge's notes, the defect not visible; and that there was no occasion to plead the want of stamp.<sup>c</sup>

**A bill not duly stamped may be looked at for a collateral object.** But though a note not duly stamped cannot be looked at by the jury as evidence of the contract in respect of which the plaintiff sues, it may be looked at by them for a collateral object. As where in an action for money lent, it was proved on behalf of the plaintiff, that he advanced ten pounds to the defendant, who gave him a note on unstamped paper; and the defence was that the defendant was drunk at the time, and imposed upon by the plaintiff, and the handwriting to the note was vouched as a proof of that fact; Lord Ellenborough permitted the jury to look at the note as a contemporary writing, to enable them to judge whether the defendant was imposed upon; and the note having the appearance of having been written by a drunken man, the defendant had a verdict.<sup>d</sup>

<sup>a</sup> *Sweeting v. Halse*, 9 B. & C. 365. (17 Eng. C. L. 394.) See *Reed v. Deere*, 7 B. & C. 261. (14 Eng. C. L. 41.)

<sup>b</sup> *Jardine v. Payne*, 1 B. & Ad. 663. (20 Eng. C. L. 463.) Lord Tenterden observed, that this decision in effect overruled the case of *Bishop v. Chambre*, 1 Danson & Lloyd, 83, which the court thought could not be supported.

<sup>c</sup> *Field v. Woods*, 2 N. & P. 117. *M'Dowall v. Lystir*, 2 M. & W. 52-56. See *ante*, 130.

<sup>d</sup> *Gregory v. Fraser*, 3 Camp. 454. It is no defence to a charge of forging a bill of exchange, that the bill was on unstamped paper, for what was forgery before the stamp acts were introduced is forgery still. *R. v. Haleswood, Bayley*, 80.

## SECTION V.

## ALTERATION.

ANY material alteration made in a bill or note, such as in date, place of payment, sum, time when payable, or in the statement <sup>At com-</sup> of the consideration after it has been completed, <sup>mon law,</sup> *without* <sup>a material</sup> *the consent* <sup>alteration</sup> of the parties thereto, will, independently of the stamp laws, make it void, for it ceases to be the same instrument. (1) As where after the acceptance of a bill, the word <sup>made in a</sup> "date" was inserted in place of "sight;" held, that the acceptor was thereby discharged from all liability to the indorsee, and that the latter could not recover even on the common counts; for the acceptor was liable only by virtue of the instrument, which being vitiated, his liability was at an end. <sup>bill or</sup> <sup>note, with-</sup> <sup>out the</sup> <sup>consent of</sup> <sup>the par-</sup> <sup>ties, will</sup> <sup>vitate it.</sup> <sup>\*389</sup>

So where the date of a bill was altered from the 26th of March to the 20th, after it had been accepted, without the knowledge of the defendant, the acceptor, and by *some persons unknown* to the jury, and after such alteration it was indorsed for a valuable consideration to the plaintiff; held, that the alteration, though by a stranger, vacated the bill.<sup>b</sup> So where an alteration was made in the name of the banking-house, where the bill was payable.<sup>c</sup> So where the drawer added the words "payable at Mr. B.'s Chiswell-street;" held, that it discharged the acceptor;<sup>d</sup> for if a bill so altered was indorsed to a person ignorant of the alteration, his right to sue the indorser, would, as the bill appeared, be complete on default made at the banker's, where the bill was payable, whereas in truth, the acceptor, not having in reality undertaken to pay *there*, would have committed no default by such non-payment.<sup>e</sup> So an alteration in the statement of the consideration will avoid the instrument, as where a note expressed to be for value received, and after it was delivered to the payee, the following words were added, "for the good will of a lease and trade;" held to be material, and to vitiate the note, because it afforded evidence

<sup>a</sup> Long v. Moore, 3 Esp. 155.

<sup>b</sup> Master v. Miller, 4 T. R. 320. 2 H. Bl. 141.

<sup>c</sup> Tidmarsh v. Grover, 1 M. & S. 735. And if such an alteration be made with a *fraudulent* intent, it will amount to forgery. R. v. Trebble, 2 Taunt. 329.

<sup>d</sup> Cowie v. Halsall, 4 B. & A. 197. (6 Eng. C. L. 399.) Jacobs v. Hart, 2 Stark. 45. (3 Eng. C. L. 237.)

<sup>e</sup> Per Lord Tenterden, in M'Intosh v. Haydon, R. & M. 362. (21 Eng. C. L. 456.) Desbrow v. Weatherley, 6 C. & P. 758. (25 Eng. C. L. 636.) And this was after the 1 & 2 G. IV, c. 78, whereby the place of payment operated only as a general acceptance. But it seems that if a place of payment be stated by the drawer, with the consent of the acceptor, after acceptance, it will not avoid the bill. Jacobs v. Hart, 2 Stark. 45. (3 Eng. C. L. 237.)

(1) (On the subject of alteration see *Bachelor v. Priest*, 12 Pick. 399. *Wheelock v. Freeman*, 13 Pick. 165. *Granite Co. v. Bacon*, 15 Pick. 239. *Boyd v. Brotherson*, 10 Wend 93.)



of a fact which otherwise must have been \*proved *aliunde*, and pointed out to the holder to inquire whether the consideration had really passed.\*

Effect of  
an imma-  
terial al-  
teration.

But if the alteration be immaterial it will not affect the validity of the instrument, even as against a party not consenting, as where a bill was addressed to *A.*, *B.* and Co., and the acceptance was by *A.* and *B.*, and the address was afterwards altered by striking out "and Co.," so as to correspond with the acceptance; held, that the alteration was immaterial, and that the acceptors were not thereby discharged, as they would be liable either way.<sup>b</sup> So the insertion of a word omitted by mistake, will not exempt any of the parties from liability on it as where the words "or order" were omitted in a bill which was *intended* to be negotiable; held, that their insertion did not discharge the payee, as it was merely the correction of a mistake.<sup>c</sup> A new stamp is necessary to render the indorser of a bill or note not negotiable, liable *thereon*, to the indorsee.<sup>d</sup>

Effect of  
the stamp  
acts in re-  
spect of  
alterations  
in a bill or  
note.

But though at common law any alteration made in a bill with the consent of all the parties, does not affect its validity, yet by the stamp acts, any *material* alteration made in a bill or note after it has been *completed*, will render it wholly inoperative, even though made with the consent of all parties. Such alteration creates a new contract, requires a new stamp, and, as has been already noticed, such stamp cannot be affixed after the instrument is completed.<sup>e</sup>

If any alteration be made *before a bill is issued*, a fresh stamp is not necessary; and a bill is issued as soon as there is any person who can make a valid claim upon it, but if it remains \*in the hands of the original drawer, even with names upon it, under such circumstances as that he cannot have any legal claim upon those persons, the bill is not issued.<sup>f</sup> Where *M.* drew a bill on *N.* payable to *M.*'s order at three months, and *N.* requested that it should be at four months instead of three, and *M.* consented to have it so altered, after which *N.* accepted it; held, that as the alteration was made before the bill was completed, or an available instrument against any party, a new stamp was not necessary.<sup>g</sup> So where three persons joined

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Alteration  
before bill  
is issued,  
will not  
vitiate it.

<sup>a</sup> Knill v. Williams, 10 East, 431.

<sup>b</sup> Farquhar v. Southey, M. & M. 14. (22 Eng. C. L. 234.) 3 C. & P. 497. Recognised in Knill v. Williams, *supra*.

<sup>c</sup> Kershaw v. Cox, 3 Esp. 246. See also Robinson v. Tourays, 1 M. & S. 217. The utmost extent of the principle established by Kershaw v. Cox, and Cole v. Perkin, 12 East, 471, is that where an instrument on stamped paper has at first been drawn by mistake, in a form not according to the intention of the parties, it may be corrected without a new stamp; but if the parties have altered their original intention, and make a new instrument different from that which they originally contemplated, then a new stamp is necessary. Per Bayley, J., in Bathe v. Taylor, 15 East, 418.

<sup>d</sup> Plimley v. Westley, 2 Bing. N. C. 249. (29 Eng. C. L. 322.) 1 Hodges, 324, *post*, 404. See Penny v. Innes, 1 C. M. & R. 439, *post*, 405, *n*.

<sup>e</sup> *Ante*, 386.

<sup>f</sup> Per Bayley, J., in Downes v. Richardson, 5 B. & A. 680. (7 Eng. C. L. 230.) Kinnerley v. Nash, 1 Stark. 452. (2 Eng. C. L. 466.) A bill is not to be con-

as drawer, acceptor, and first indorser of an accommodation bill, and before it was issued *for value* an alteration had been made in the date of it; held, that a new stamp was not necessary, the alteration having been made before it was *issued in point of law*; for an accommodation bill is not issued until it is in the hands of some person who is entitled to treat it as a security available in law; held also, that as the acceptor had assented to the alteration after he had been informed of it, he was liable on it to an indorsee for a valuable consideration. Abbott, C. J., said, "that until it was negotiated, it was an unavailable instrument; and that it first became a bill of exchange when it was issued to the indorsee for a valuable consideration." "The alteration," (said Bayley, J.,) "had vacated the acceptance, and gave the acceptor a right to say, 'my name is off the bill,' but he may waive the benefit of such an objection, and I think he has done so, for I consider his assent as equivalent to a new acceptance."<sup>a</sup>

It appears then that any material alteration made in a bill or note even with the consent of the parties after it is issued, that is, after it has got into the hands of a person who can enforce payment from any other party thereto, renders it void; but if made before it gets into the hands of a party who cannot sue upon it, it is binding on all parties assenting thereto; therefore where a bill was indorsed by the drawer to the payee before acceptance, and the drawee altered the date before he accepted it; held void, because the payee had, before the alteration, acquired a right to sue the drawer on it;<sup>b</sup> and on the same principle, where the date of a bill was altered by the payee, at the request of the acceptor, before acceptance, but after it had been delivered to him for a debt; held, that it was thereby rendered void, and that the payee would not recover on it, even against the acceptor.<sup>c</sup> An exchange of acceptances is a sufficient negotiation to render a new stamp necessary.<sup>d</sup> Where a promissory note payable *on demand with interest*, had been written by the payee, and signed by the maker, after which it was handed to another person to attest, but before it was returned to the payee, it was by consent of all parties altered by substituting the words, "one month after date," for the words, "on demand with interest;" held, that it was all one transaction, and that it could not be considered as issued at the time of the

An alteration made, even with consent, after the bill is issued, will vitiate it.

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sidered as issued so as to make a new stamp necessary until it is in the hands of some one entitled to make a claim thereon. Bayley, 116.

<sup>a</sup> *Downes v. Richardson*, 5 B. & A. 674. (7 Eng. C. L. 227.) If the assent was a new acceptance, could the plaintiff recover since 1 & 2 G. IV, c. 79, s. 2, which requires the acceptance to be in writing?

<sup>b</sup> *Outhwaite v. Luntley*, 4 Camp. 179.

<sup>c</sup> *Walton v. Hastings*, 4 Camp. 223. 1 Stark. 215. (2 Eng. C. L. 362.) A note of nine months after date, was by consent of all the parties, a fortnight after it had been delivered to the payee, altered to ten months after date; held, that a new stamp was necessary. *Wilson v. Justice*, Peake, Add. 96. Bayley, 110.

<sup>d</sup> *Cardwell v. Martin*, 1 Camp. 79. 9 East, 190.

alteration.<sup>a</sup> But where a bill dated the 1st of August, was drawn at two months payable to the order of the drawer, and after the drawer had kept it twenty days, the date was altered to the 21st, by the consent of the acceptor, and before it was indorsed; held, that by the alteration it was made void, since the bill had been an available instrument in the hands of the drawer, and had been drawn according to the original intention of the parties.<sup>b</sup>

Correc-  
tion of a  
mistake.

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But an alteration made to correct a mistake will not vitiate an instrument.<sup>c</sup> Where a bill was dated by mistake, in 1822, instead of 1823, and the agent of the drawer and acceptor, without their knowledge or consent, corrected the mistake; held not to render the bill void.<sup>d</sup> We have already seen that if a blank \*be left in a bill for the name of a payee, a *bond fide* holder may insert his own name as payee, and a new stamp is not necessary to give validity to such an instrument.<sup>e</sup> Where a joint and several promissory note was made by several parties concerned in a joint undertaking for the purpose of securing the repayment of a loan of money, and one of the parties signed it, some days after the party who borrowed the money, held, that the note did not require an additional stamp, if the last signature was put, or if the party had *promised* to sign the note before the money was advanced, notwithstanding it might not have been signed until afterwards.<sup>f</sup> Where a bill had been made payable by the acceptor at his own house at Chelsea, and six weeks after it had been delivered to the payee the acceptor, at the request of the payee, altered the place of payment, by making it payable "at Bland's Great Surrey-street;" held, that the alteration was immaterial.<sup>g</sup>

Alteration  
apparent  
on the face  
of the in-  
strument.

It has been held that if an alteration be apparent on the face of the bill or note, it is incumbent on the holder to prove that it was made under such circumstances as will make the bill available, and where an action had been brought on a note which presented an appearance of an alteration, Lord Tenterden told the jury, that it was the duty of the plaintiff to account for the suspicious form of the instrument, and as the plaintiff had adduced no evidence to explain the alteration, he advised the jury to find a verdict for the defendant; and the jury found accordingly.<sup>h</sup> But where in an action by the indorsee against the acceptor, the note had the appearance of having been altered in the amount; and after the acceptance, were the words "at Cock-

<sup>a</sup> Sherrington v. Jermyn, 3 C. & P. 374. (14 Eng. C. L. 356.)

<sup>b</sup> Bath v. Taylor, 15 East, 412

<sup>c</sup> Kershaw v. Cox, *ante*, 390.

<sup>d</sup> Brutt v. Pickard, R. & M. 37. (21 Eng. C. L. 376.) Peake, Add. 97.

<sup>e</sup> Attwood v. Griffin, 1 R. & M. 425, (11 Eng. C. L. 351,) *ante*, 368.

<sup>f</sup> *Ex parte* White, 2 Dea. & Chitty, 334.

<sup>g</sup> Walter v. Cubley, 2 C. & M. 151. 4 Tyr. 87.

<sup>h</sup> Bishop v. Chambre, M. & M. 116. 3 C. & P. 55. (14 Eng. C. L. 207.) See also Johnson v. The Duke of Marlborough, 2 Stark. 313. (3 Eng. C. L. 360.) Henman v. Dickenson. 5 Bing. 183. (15 Eng. C. L. 409.)

burn's," not in the acceptor's handwriting; neither of the parties having given any evidence respecting the alteration; Lord Lyndhurst left it to the jury to say, whether the bill had been altered after the acceptance, for if they thought so, the \*plaintiff could not recover.<sup>a</sup> In an action by the indorsee against the acceptor, who denied the acceptance in manner and form, &c.; held, that the defendant might prove under that plea, that a material alteration had been made in the bill after he had accepted it; without pleading that fact specially, for the alteration made it a different bill; consequently, the defendant did not accept the bill set out in the declaration.<sup>b</sup>

Where in an action against the indorser of a bill of exchange, the defendant by his plea denied the presentment at maturity and notice of dishonor; when the bill was produced at the trial, an alteration appeared on the face of it; held, that as the pleadings admitted the acceptance, the plaintiff was not bound to explain the alteration.<sup>c</sup>

A bill or note vitiated by alteration, like an instrument not duly stamped, is inadmissible in evidence, for any available purpose in favor of the holder.<sup>d</sup> It is void as a security, and the alteration takes away the remedy against every party between whom and the holder there is no privity; but it does not operate as an extinguishment of the debt or consideration, which may be recovered if proved *aliunde*, unless the alteration be made by the creditor, and the rights of the debtor might be thereby prejudiced.

As where the indorsee sued the acceptor on a bill which was rendered void by a material alteration, whereby the defendant was discharged, and the plaintiff proposed to give evidence in support of the common counts; Lord Kenyon ruled that it could not be done, nor could the plaintiff recover at all against the acceptor, who was liable only by virtue of the instrument, which being vitiated, his liability was at an end. There was no privity between the parties.<sup>e</sup> But where the plaintiff deposited a sum of money with his bankers, who gave him a note promising to pay the principal with 3 per cent. interest, and at a subsequent period the banker altered the 3 per cent. to 2½, with the consent of the plaintiff; held, that though the instrument thereby became void as a security, the alteration did not extinguish the debt, or avoid the terms on which the loan was made; and that the note might be given in evidence to prove the terms on which the money was deposited; (there being other evidence to show that the money was deposited on \*terms which were contained in the note.<sup>f</sup>) So, where the

Consequences of a bill being vitiated by alteration.

<sup>a</sup> Taylor v. Mosely, 6 C. & P. 273. (25 Eng. C. L. 393.)

<sup>b</sup> Cock v. Coxwell, 1 Gale, 177. 2 C. M. & R. 291.

<sup>c</sup> Sibley v. Fisher, Q. B. MS. M. T. 1837.

<sup>d</sup> See *ante*, 387.

<sup>e</sup> Long v. Moore, cited 3 Esp. 155. See Eales v. Dickes, M. & M. 324. (22 Eng. C. L. 323.)

<sup>f</sup> Sutton v. Toomer, 7 B. & C. 416. (14 Eng. C. L. 66.)

buyer of goods paid for them by his own acceptance, and the seller altered the date of the bill, whereby it was vitiated; held, that he did not thereby preclude himself from suing the acceptor for the original debt, and that he might recover for goods sold.<sup>a</sup>

But where the vendee of goods paid for them by a bill of exchange, which he drew on a third person, and the vendor altered the time of payment whereby the bill was vitiated; held, that by so doing he made the bill his own and caused it to operate as a satisfaction of the original debt; and, consequently, that he could not recover the price of the goods from the vendee. Lord Tenterden, in delivering the judgment of the court, said, "It is perfectly clear that a bill of exchange will operate as a satisfaction of a preceding debt, if the holder make it his own by laches, as by not presenting it for payment when due. Here the plaintiff, by altering the bill in a material part, made it his own, as against the defendant, and caused it to operate as a satisfaction of the debt for which it was originally given; allowing the plaintiff to recover the value of the goods in this action, and the defendant to bring a cross action for the special damage sustained by reason of the destruction of the bill, would lead to a multiplicity of actions, which is against the policy of the law."<sup>b</sup>

## SECTION VI.

### TRANSFER OF A BILL OF EXCHANGE.

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1.—*How a bill or note is transferable.*] A bill or note payable to order is transferable by indorsement only; if payable to \*bearer it is transferable by mere delivery.<sup>c</sup> On a transfer by delivery only without indorsement, the person making it ceases to be a party to the instrument, and is not liable to be sued on it.<sup>d</sup>

<sup>a</sup> Atkinson v. Hawdon, 1 Harr. & Wool. 77. 2 Ad. & Ell. 628. (29 Eng. C. L. 169.) 4 N. & M. 409. See Sloman v. Cox, 1 C. M. & R. 471. 5 Tyr. 174.

<sup>b</sup> Alderson v. Langdale, 3 B. & Ad. 660. (23 Eng. C. L. 155.)

<sup>c</sup> *Ante*, 368.

<sup>d</sup> The Bank of England v. Newman, 1 Lord Raym. 442. Comyn, 57. Fyde v. Clarke, 1 Esp. 447.

No particular form of words is essential to an indorsement, Transfer the mere signature of the indorser is sufficient;(1) if it mentions by in- the name of the person in whose favor it is made, it is termed dorsement a *full* or a *special indorsement*; if made merely by writing the indorser's name on the bill, it is termed a *blank* indorsement, the effect of which is to make the bill or note payable to the bearer; and it is immaterial whether the indorsement be on the face or on the back of the instrument.<sup>a</sup>

The effect of a special indorsement is to restrain the negotia- Effect of bility of the bill or note; as if *A.* indorse a bill thus, "pay *B.* special in- or order," and sign his name; the instrument thereby is paya- dorsement ble to *B.* only or his order, and cannot be transferred without the indorsement of *B.* But *B.* may afterwards indorse it in blank, or to some specified person, without adding "or order;" and if such person indorse it, any subsequent indorsee may sue any of the antecedent parties to the bill. As where the defendant drew a bill made payable to *S.* or order, and *S.* indorsed it to *W.*, who indorsed it to the plaintiff; it was contended, that as there were no words to authorise *W.* to assign it, he had no such power; but the court held, that as the bill was at first assignable by *S.* as being made payable to him or his order, and all *S.*'s interest was transferred to *W.*, the right of assigning it was transferred also, and the indorsee had judgment against the drawer.<sup>b</sup>

Bills and notes are frequently indorsed in this manner, Restrict- "pray pay the money to my use," in order to prevent their ive in- being filled up with such indorsement as passes the interest.<sup>c</sup> dorse- This is a restrictive indorsement, which prevents the indorsee ments. from transferring the instrument, or of converting the produce of it to his own use.

\*The plaintiff, a merchant in America, remitted a bill to *B.*, <sup>4397</sup> his agent in London, indorsed by him in these words, "Pay to *B.* of London, or his order for my use." The day after *B.* received it, he discounted it with the defendants, his bankers, shortly after which he failed, and the defendants having received the amount of the bill from the acceptor, held, that the plaintiff was entitled to recover the amount of the bill from the bankers in an action for money had to his use, for the indorsement on the bill restricted its negotiability; whoever received money on it, received it to the use of the indorser; *B.* could not, by indorsing it, confer a greater interest than the indorser had given him, which was a mere trust; and which trust was

<sup>a</sup> *R. v. Bigg*, Stra. 18, recognised in *Yarborough v. The Bank of England*, 16 East, 12.

<sup>b</sup> *Moor v. Manning*, Comyn, R. 11. *Acheson v. Fountain*, 1 Stra. 557. *Edie v. The East India Company*, 2 Burr. 1216.

<sup>c</sup> Per Lord Hardwicke, in *Snee v. Prescott*, 1 Atkin, 249. And per Wilmot, J., 2 Burr. 1227.

(1) (His initials are sufficient. *Merchants Bank v. Spicer*, 6 Wend. 443.)  
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apparent on the face of the instrument itself.<sup>a</sup> Where a bill, payable to plaintiff or order, was indorsed by him in this form, "Pay the within to *B.* or order, on my being gazetted ensign, if within two months from this date." The bill was at forty-five days after date; the defendants accepted it after it was so indorsed; *B.* indorsed it over, and after it had passed through several hands the defendants paid it, though the plaintiff's name was not gazetted; held, that the plaintiff might recover the amount from the defendants, for the indorsement of the plaintiff was a conditional transfer of his interest in the bill, and the defendants by accepting it, subsequently became parties to such conditional transfer; and as the condition was not performed, the transfer was defeated, and the property in the bill reverted to the plaintiff.<sup>b</sup> Where an indorsement was in this form, "Pay *A.* or order for account of *B.*," and *A.* indorsed the bill to the defendant on his own account, to whom he was then indebted in more than the value of the bill; *A.* having failed, *B.* brought trover for the bills; held, that though *A.* might pass a title in the bill to a person who might suppose that the bill was passed for the use of *B.*, yet *A.* could not pledge it on his own account for the plaintiff.<sup>c</sup>

**\*398**      The inference from these cases is, that a restrictive indorsement \*precludes the person in whose favor it is made from making a transfer, so as to give a right of action against either the person making it, or any of the antecedent parties; and if payment be made to the person to whom such transfer is made, the party paying may, under circumstances, be liable to pay the money a second time;<sup>d</sup> or the person receiving it may be liable to refund.<sup>e</sup>

**Indorsement in blank, effect of.**      An indorsement in *blank* transfers a right of action to a *bond fide* holder, against all the parties to the bill: and it conveys a joint right of action to as many as agree in suing on it; whether they be in partnership or not.<sup>f</sup> As where three persons separately indorsed a bill for the accommodation of the drawer, and on the bill being dishonored, they paid the amount among them; held, that they might bring a joint action against the previous indorser.<sup>g</sup> But as by the law of France, an indorsement in blank does not transfer any property in a bill, the holder of a bill drawn in that country, and indorsed there in blank, cannot recover against the acceptor in the courts of

<sup>a</sup> *Sigourney v. Lloyd*, 8 B. & C. 622. (15 Eng. C. L. 319.) This case was confirmed in *Error* on consideration of all the cases. See 5 Bing. 525. (15 Eng. C. L. 527.) *Archer v. The Bank of England*, Doug. 615-637.

<sup>b</sup> *Robertson v. Kensington*, 4 Taunt. 30.

<sup>c</sup> *Treuttell v. Barandon*, 8 Taunt. 100. (4 Eng. C. L. 33.)

<sup>d</sup> See *Robertson v. Kensington*, *Treuttell v. Barandon*, *ante*, 397.

<sup>e</sup> *Archer v. The Bank of England*, Doug. 615. Bayley, 129.

<sup>f</sup> Per Lord Ellenborough, in *Ord v. Portal*, 3 Camp. 240.

<sup>g</sup> *Low v. Copestake*, 3 C. & P. 300. (14 Eng. C. L. 316.) See also *Rordanz v. Leach*, 1 Stark. 446. (2 Eng. C. L. 463.)

this country.<sup>a</sup> Where *A.* indorsed a note to *B.* to get payment; held, that *B.* might recover against the acceptor on it, though *A.* said at the trial, that he did not authorise him to bring the action.<sup>b</sup> The right of action on a bill of exchange accepted for value, may be transferred by indorsement without value, as by way of gift.<sup>c</sup> Though a blank indorsement makes the instrument payable to the bearer, the holder may write over it what he pleases, and consequently he may convert it into a special indorsement by using restrictive words, such as "pay the contents to *B.*" But the holder writing a restrictive indorsement will not thereby make himself liable to any subsequent holder, unless he subscribes his own name; as where the payee of a bill indorsed it in blank to the defendant, who wrote over the payee's signature, "pay the contents to *V.*," without signing his own name, and transferred it to plaintiff; held, not to be \*an indorsement by the defendant; for, to make it an indorsement, the name of the party must appear written with an intent to indorse.<sup>d</sup> But if a bill be once indorsed in blank, though it be afterwards indorsed specially or in full, the bearer may sue the drawer, or the acceptor, or the payee; for the holder may strike out all indorsements subsequent to that of the payee, and declare against the latter as his indorser.<sup>e</sup> \*399

It is no objection to the validity of a bill of exchange that the indorsement or acceptance was written before the bill was drawn, though the indorser be a stranger to the acceptor.<sup>f</sup> Where a bill of exchange has been negotiated by forging the name of the payee as indorser, a court of equity will restrain even a *bond fide* holder from suing the acceptor, even though there be a real indorsement by the payee after the bill has arrived at maturity.<sup>g</sup> Indorsement before the bill be drawn.

2.—*Transfer by delivery.*] In general, no person can make a valid transfer of a bill, except a party who has a legal right to it himself. But a bill or note transferable by mere delivery such as a bill or note payable to bearer, or indorsed in blank, will confer on the holder a title against all parties thereto, provided he has received it *bond fide* for a valuable consideration and without being guilty of gross negligence in taking it, however impeachable the right of the person who has transferred it may be. As where an accommodation bill had been issued by the drawer to a bill broker to get discounted, and the latter had fraudulently and without any authority sold it to *A.*, for Effect of transfer by delivery.

<sup>a</sup> *Trimbey v. Vignier*, 1 Bing. N. C. 151. (27 Eng. C. L. 336.) 6 C. & P. 25. (25 Eng. C. L. 263.)

<sup>b</sup> *Adams v. Oakes*, 6 C. & P. 70. (25 Eng. C. L. 286.)

<sup>c</sup> *Heydon v. Thompson*, 1 Ad. & Ell. 210. (28 Eng. C. L. 71.) 3 N. & M. 319.

<sup>d</sup> *Vincent v. Horlock*, 1 Camp. 442. See also *Clerk v. Pigot*, 12 Mod. 193.

<sup>e</sup> *Smith v. Clark*, Peake, 225.

<sup>f</sup> *Schultz v. Astley*, 2 Bing. N. C. 544. (29 Eng. C. L. 414.) 7 C. & P. 99. (32 Eng. C. L.) 1 Hodges, 425.

<sup>g</sup> *Esdaile v. La Nauze*, 1 Y. & Coll. 394.

whom the plaintiff discounted it; in an action by the plaintiff against the drawer, the question left to the jury by Lord Denman, was, whether the plaintiff *was guilty of gross negligence* in taking the bill, and the jury having found in the negative, the plaintiff had a verdict; on a motion to enter a nonsuit, it was  
 \*400 contended, on the \*authority of *Down v. Halling*,<sup>a</sup> that the question which ought to be submitted to the jury, was whether the plaintiff had taken the note under circumstances which ought to excite the suspicion of a prudent man; but the court held that the jury were properly directed. Taunton J. "I cannot estimate the degree of care which a prudent man should take. The question put whether the plaintiff was guilty of gross negligence was more definite and appropriate." Paterson, J: "I never could understand what was meant by a party's taking a bill under circumstances which ought to have excited the suspicion of a prudent man."<sup>b</sup> It makes no difference that the instrument was lost or stolen, or pledged for a special purpose; a *bond fide* holder will be entitled to recover on it, though he take it without care or caution.<sup>c</sup> A bank note payable to *W.* or bearer, was stolen, and on the following day it came into the hands of the plaintiff for a valuable consideration in the usual course of his business; held, that he was entitled to recover on it.<sup>d</sup> When it is shown that the bill has been lost, or fraudulently or feloniously obtained from the rightful owner, the holder who sues must prove that he gave a valuable consideration for it.<sup>e</sup>

It may be laid down as a general rule, that the *bond fide* holder for valuable consideration, of a bill or note transferable by delivery, who has not been guilty of *gross negligence* in taking the same, has a legal title therein against all the parties to the instrument, however fraudulently the person who has transferred it to him may have obtained it. But, on the  
 \*401 other hand, if the holder has \*not taken it *bond fide*, if he be cognisant of any defect in the title of the person from whom he has received it, or if he has been guilty of *gross negligence* or carelessness in taking it, by not making inquiries when the circumstances under which the instrument was offered to him

<sup>a</sup> 4 B. & C. 330. (10 Eng. C. L. 347.)

<sup>b</sup> *Crook v. Jadis*, 5 B. & Ad. 909. (27 Eng. C. L. 234.) *Backhouse v. Harrison*, *id.* 1099, (27 Eng. C. L. 276,) *post.* This decision overrules *Gill v. Cubitt*, 3 B. & C. 466. (10 Eng. C. L. 154.) *Down v. Halling*, 4 B. & C. 330, (10 Eng. C. L. 347,) and other cases where it has been decided that the proper question for the jury was, "whether the plaintiff had received the bill under circumstances which ought to excite the suspicions of a prudent man." In *Slater v. West*, 3 C. & P. 325, (14 Eng. C. L. 330,) Lord Tenterden said that this was a doctrine of modern origin, and that he was the first judge who decided that point at Nisi Prius. See *Vaughan v. Menlove*, 3 Bing. N. C. 468, (32 Eng. C. L.) *post.*

<sup>c</sup> *Foster v. Pearson*, 1 C. M. & R. 849.

<sup>d</sup> *Miller v. Race*, Burr. 452. *Grant v. Vaughan*, *id.* 1516. *Anon.* Lord Raym. 738. *Collins v. Martin*, 1 B. & P. 651. See further on this subject under the head "Lost bills."

<sup>e</sup> *Paterson v. Hardacre*, 4 Taunt. 114.

were calculated to excite his suspicion, (which is a question for the consideration of the jury,) he cannot enforce payment from the parties, and the true owner may recover it from him in an action of trover.<sup>a</sup> Where the defendants, bankers in a small town, gave notes of their own in exchange for a 500l. Bank of England note to a stranger, without asking him any questions; held, that the plaintiff, from whom the note had been stolen, might recover it from the bankers in an action of trover. Best, C. J., observed that "the party's caution should increase with the amount of the note which he was called upon to change; a man might change a 20l. note without asking a question, but that would not be right as to one of several thousands.<sup>b</sup>

3.—*Transfer by indorsement.*] Where an indorsement is necessary to make a transfer of a bill or note as in the case of a full or special indorsement; no indorsement will convey a legal right to an instrument, (except as against the person making it,<sup>c</sup>) unless it be made by a person authorised to transfer it. As where a bill payable to Henry Davis or order, was sent by post and got into the hands of a wrong Henry Davis, who indorsed it to the plaintiff; held, that the holder could not recover the amount from the acceptor, though there was no particular description on the bill of the person entitled to transfer it; for as the indorsement was not made by the person to whom the bill was really payable, it was a forgery, and could confer no title.<sup>d</sup> Where a bill was \*made payable to a single woman or order, and she married and indorsed it to the plaintiff, held, that the plaintiff acquired no title to it, for the right to assign the note was vested in the husband by the marriage.<sup>e</sup> But if the husband permit his wife to transact business for him, or if he has recognised indorsements made by her, it will be presumed that she acted as his agent and had his authority to indorse.<sup>f</sup> After the death of the holder, his executor or administrator has a right to transfer his negotiable instruments.<sup>g</sup> "It is immaterial whether he indorse it as executor or not. If he indorse it at all he is liable personally and not as executor; for his indorsement would not give an action against the effects of the testator."<sup>h</sup>

\*402

<sup>a</sup> See *Egan v. Threlfall*, 5 D. & R. 326. (16 Eng. C. L. 237.) *Foster v. Pearson*, 1 C. M. & R. 849. *Beckwith v. Corral*, 3 Bing. 444. (13 Eng. C. L. 44.) *Snow v. Sadler*, 3 Bing. 610. (13 Eng. C. L. 69.) *Strange v. Wigney*, 6 Bing. 677. (19 Eng. C. L. 201.) *De la Chaumette v. The Bank of England*, 9 B. & C. 208; (17 Eng. C. L. 356;) and other cases, *post*, under the head "Stolen Notes."

<sup>b</sup> *Snow v. Peacock*, 2 C. & P. 221. (12 Eng. C. L. 98.)

<sup>c</sup> *Penny v. Innes*, 1 C. M. & R. 439, *post*, 405.

<sup>d</sup> *Mead v. Young*, 4 T. R. 28, *ante*, 368.

<sup>e</sup> *Connor v. Martin*, Stra. 516. *M'Neilage v. Holloway*, 1 B. & A. 918.

<sup>f</sup> See *Coates v. Davis*, 1 Camp. 485, *ante*, 342. *Prestwick v. Marshall*, 4 C. & P. 594, (19 Eng. C. L. 541,) *ante*, 342. *Barlow v. Bishop*, 1 East, 432.

<sup>g</sup> *Rawlinson v. Stone*, 3 Wills. 1. 2 Stra. 1260.

<sup>h</sup> Per Buller, J., in *King v. Thom*, 1 T. R. 489. See *Child v. Monins*, 5 Moore, 282. (6 Eng. C. L. 200.)

Where indorser is a trustee.

4.—*Transfer by trustee.*] Where a bill is indorsed to one man and deposited with him as trustee for the use of another; the right of transfer is in the former only. As where a bill was made payable to *A.* or order, to the use of *B.*, and *A.* indorsed it to *C.*, after which an extent issued against *B.*, and the money due upon the bill was extended in the hands of the drawer. These facts having appeared on the pleadings, in an action by *C.* against the drawer upon demurrer, two questions arose; 1st, whether *B.* had such a right as could be extended; and 2dly, whether *A.* had power to indorse the bill. Held, that *B.* had not such an interest in the bill as could be extended; he had merely an equitable right, not a legal interest, for he could not maintain an action on the bill against the acceptor: 2dly, that *A.* was empowered to indorse the bill.<sup>a</sup>

\*403 So, where the acceptor of a bill who had received no value for it, delivered it to the drawer, desiring him to hold it for the acceptor's use, and the drawer indorsed it over for value to the defendant, who knew that the drawer had no \*authority to part with it; it was held, that the acceptor might recover it in trover from the defendant; for the latter having taken the bill with a knowledge of the facts, had not a better title to it than the drawer.<sup>b</sup> It is established by a variety of cases, that if a bill be deposited with or indorsed to a party for a particular or special purpose, a person taking the bill with a knowledge of the circumstances, cannot acquire a right therein which would contravene the purpose for which it was so deposited or indorsed.<sup>c</sup>

5.—*Transfer by bankrupt.*] If the person who has a right to transfer a bill or note delivers it over for a valuable consideration, without indorsing it, and afterwards becomes a bankrupt, he may nevertheless indorse it.<sup>d</sup> Where the drawer of a bill of exchange deposited it with a creditor and authorised him to receive the proceeds and apply them in a specified way, and the drawer afterwards committed an act of bankruptcy, after which the creditor delivered the bill to the acceptor and took in lieu of it another bill; held, that by so delivering the bill to the acceptor he had been guilty of a conversion, and that the assignees might recover against him in trover.<sup>e</sup>

Where a banker or other agent becomes bankrupt, bills paid in by his customers remaining in his hands, will, subject to the

<sup>a</sup> *Evans v. Cramlington*, Carth. 5.

<sup>b</sup> *Evans v. Kymer*, 1 B. & Ad. 528. (20 Eng. C. L. 437.)

<sup>c</sup> *Goggerly v. Cuthbert*, 2 N. R. 170. *Treuttel v. Barandon*, 8 Taunt. 100. (4 Eng. C. L. 33.) *Sigourney v. Lloyd*, 9 B. & C. 622. (15 Eng. C. L. 319.) *Archer v. The Bank of England*, Doug. 615. *Edie v. East India Company*, 3 Burr. 1227, ante, 398.

<sup>d</sup> *Smith v. Pickering*, Peake, 50.

<sup>e</sup> *Robson v. Rolls*, 1 Mood. & R. 239. As to the right of transferring bills or notes where bankruptcy intervenes, see *passim*, under the head "*Bankruptcy*."

banker's liens thereon, belong *prima facie* to the respective customers, and not to the assignees.\*

6.—*Of the liability of the indorser or the party who transfers.]* Bills or notes payable to order or to bearer, or containing any words to make them assignable or transferable *ad infinitum*, so as to give the transferee or a *bond fide* holder, a right of action thereon \*against all antecedent parties, and if there be no words in the instrument making it assignable; as where it is made payable to some specified person without the words, “or order or bearer,” the indorsee has nevertheless a right of action thereon against the indorser, but not against any of the antecedent parties; “for every indorser is in the nature of a new drawer, and the indorser stands to his indorsee in the law of merchants, the same as the drawer.”<sup>b</sup> As where a note was made payable generally to *A.*, who indorsed it to *B.*, who transferred it to the plaintiff without indorsement; in an action against *A.* it was objected that the note was not assignable without the words “or order.” But Holt, C. J., said, that though the indorsement did not make the drawer chargeable to the indorsee for want of words which would make it assignable, still the indorsement of a note which has not such words is good, so as to make the indorser chargeable to the indorsee.<sup>c</sup>

Liability  
of the in-  
dorser.

\*404

It is observable, however, that as the indorsement is a new contract, the indorser of an instrument not negotiable, is not liable *thereon* to the indorsee without a new stamp, though he is liable for the consideration which the latter gave for it. It is a question of law, whether a bill or note be negotiable or not.<sup>d</sup> Where the indorsee of a promissory note, which was not negotiable by reason of its not being payable “to order,” indorsed it to the plaintiff in payment for goods; held, that he was liable to the plaintiff for the *price of the goods*, though the latter had been guilty of laches in not presenting the note; for as the plaintiff could not sue the maker of the note, by reason of its not being negotiable, the defendant could sustain no injury by his laches, and the plaintiff could not sue the defendant on the note for want of a stamp applicable to the new contract, though there was a sufficient stamp on the face of the note to make it valid as between the original parties.<sup>e</sup>(1)

When the  
instru-  
ment is  
not nego-  
tiable.

\* Giles v. Perkins, 9 East, 12, *ante*, 264. Zinck v. Walker, 2 Bl. 1154.

<sup>b</sup> Per Lord Ellenborough, in Ballingalls v. Gloster, 3 East, 482. Smallwood v. Vernon, Stra. 478. Penny v. Innes, 1 C. M. & R. 439.

<sup>c</sup> Hill v. Lewis, 1 Salk. 132. Smith v. Kendall, 6 T. R. 123.

<sup>d</sup> Per Lord Mansfield, in Grant v. Vaughan, 3 Burr. 1523.

<sup>e</sup> Plimley v. Westley, 2 Bing. N. C. 249. (29 Eng. C. L. 322.) 1 Hodges, 324, *ante*, 390.

(1) (The contract which the law *prima facie* implies from a blank indorsement of a promissory note not negotiable is, that the note is due and payable according to its tenor, that the maker shall be able to pay it, when it comes to maturity, and that it is collectible by the use of due diligence. Perkins v. Callin, 11 Conn. 213. Laflin v. Pomeroy, 11 Conn. 440. See Houk v. Foley, 2 Penn, 243, where it was held that the words “without defalcation” in a sealed



But a different rule prevails in case of negotiable instruments.

**\*405** **Every indorser is a new drawer.** \*Where the payee of a bill of exchange indorsed it specially to the plaintiffs, and immediately after the special indorsement, the defendants indorsed the bill, and then the plaintiffs indorsed it, it was contended, that as the defendant was a mere stranger to the bill and had no property in it, he could not render himself liable by writing his name on it; and that he had no power of transferring the property in it; but the court held, that he was liable on his indorsement, and that a new stamp was not necessary. "Every indorser," said Parke, B., "is a new drawer, and it is part of the inherent property of the original instrument, that an indorsement operates as against the indorser in the nature of a new drawing of the bill by him; still it remains the same instrument as before, and does not require a fresh stamp, for it is not a fresh instrument. It is not necessary that an indorser should have property in the bill, in order to render him liable to be sued upon it. Suppose a man steals a bill and indorses it for value, might it not in pleading be stated that he drew the bill?"<sup>a</sup>

**Extent and limit of indorser's liability.**

The extent and limit of the indorser's contract in respect of a negotiable instrument is, that the acceptor will pay, or on his default, he, the indorser, on due notice thereof, will pay. But the indorser may frame the indorsement so as to incur no personal responsibility, as by adding the words *sans recours*, or any other words of equivalent meaning.<sup>b</sup> So a bill may be indorsed conditionally;<sup>c</sup> an indorsement may be revoked before it has been delivered over to a *bona fide* holder,<sup>d</sup> but not afterwards without his consent.<sup>e</sup> The cancellation of an indorsement by mistake will not discharge the indorser;<sup>f</sup> nor the striking out of the acceptance by mistake.<sup>g</sup>

**Liability of a party transferring by delivery.**

**\*406**

A transfer by mere delivery, without an indorsement, if made on account of an antecedent debt, or for a valuable consideration passing at the time, imposes an obligation on the party making it, to the person in whose favor it is made, equivalent to that of a transfer by indorsement. But the transferer cannot be sued on the instrument, he is liable only for the consideration, if the bill be dishonored, unless the transfer-

<sup>a</sup> Penny v. Innes, 1 C. M. & R. 439.

<sup>b</sup> Chitty, 266.

<sup>c</sup> See post.

<sup>d</sup> Cox v. Troy, 5 B. & A. 474. (7 Eng. C. L. 163.) This was the case of an acceptor, but it is apprehended that the same principle applies to an indorser.

<sup>e</sup> Chitty, 267.

<sup>f</sup> Wilkinson v. Johnson, 3 B. & C. 428. (10 Eng. C. L. 140.)

<sup>g</sup> Raper v. Birkbeck, 15 East, 17. Novelli v. Rossi, 2 B. & Ad. 757. (22 Eng. C. L. 176.)

note made to order and indorsed in blank, did not preclude the maker from taking defence against the assignee. That a sealed note is not negotiable so as to entitle the transferee to sue in his own name, see *Clark v. Farmers' Co.* 15 Wend. 256.

The indorser of a note not negotiable has no right to insist on demand and notice. *Seymour v. Van Slick*, 8 Wend. 403.)

ree has made it his own by laches;<sup>a</sup> or if it be forged,<sup>b</sup> he is not liable to a subsequent transferee, for there is no privity of contract between him and them.<sup>c</sup>

But if a bill or note be sold without indorsement, that is, if it be given in exchange for goods or for other bills, or for a consideration passing at the time, and it be agreed that the party take the bill in payment and run the risk of its being paid, the transferrer will not be liable to refund the consideration, if he did not know at the time that it was not a good bill.<sup>d</sup> When a bill or note is sold.

Where *A.* discounted bills with a banker and received other bills in part of the discount, but not indorsed by the banker; held, that *A.* having taken them without indorsement, must be taken to have received them on their own credit only, and though they turned out to be bad, the bankers were not liable on them, for by not indorsing them they refused to pledge their credit to their validity.<sup>e</sup> "If a party consents to take notes as money, he takes them at his peril."<sup>f</sup>

7.—*Time of indorsement.*] Bills and notes are most usually indorsed after acceptance and before they become due; but a transfer may be made before acceptance, and after the bill has become due. An indorsement may be made on a blank stamp, and the indorser will be liable to all the subsequent parties to the bill, to "any amount inserted therein applicable to the stamp." Indorsement may be on a blank stamp. As where the defendant to accommodate one *G.* indorsed his name on five copper-plate checks, made in the form of promissory notes, but in blank, and *G.* filled them up as he thought fit, <sup>\*407</sup> and the plaintiff discounted them, knowing that the notes were in blank at the time of the indorsement; in an action by the plaintiff against the indorser, Lord Mansfield said, "Nothing is so clear as that the indorsement on a blank note is a letter of credit for an indefinite sum. The defendant said trust *G.* to any amount, and I will be his security. It does not lie in his mouth to say, the indorsements were not regular.<sup>g</sup> And where a bill was drawn and indorsed by the payee before the time it bore date, and the payee died before the day on which it bore date, acceptance having been refused; held, that the indorsee might sue the drawer on the bill.<sup>h</sup>

<sup>a</sup> *Ex parte* Blackburne, 10 Ves. 204. *Owenson v. Morse*, 7 T. R. 65.

<sup>b</sup> *Jones v. Ryde*, 5 Taunt. 488. (1 Eng. C. L. 166.) *Bruce v. Bruce*, 1 Marsh. 165. (1 Eng. C. L. 170.) *Fuller v. Smith, R. & M.* 49. (21 Eng. C. L. 379.)

<sup>c</sup> *In re* Barrington, 2 Sch. & Lef. 112. *Ward v. Evans*, Lord Raym. 928.

<sup>d</sup> *Fenn v. Harrison*, 3 T. R. 759.

<sup>e</sup> *Fydell v. Clarke*, 1 Esp. 446. *Emly v. Lye*, 15 East, 7.

<sup>f</sup> Per Bayley, J., in *Camidge v. Allenby*, 6 B. & C. 382. (13 Eng. C. L. 203.)

<sup>g</sup> *Russell v. Langstaffe*, Doug. 514. See *Usher v. Dauncey*, 4 Camp. 97. *Schultz v. Astley*, *ante*, 399.

<sup>h</sup> *Passmore v. North*, 13 East, 517. But by 17 Geo. III, c. 30, s. 1, bills or notes under 5*l.* shall not be indorsed before the date thereof, and the 48 Geo. III, c. 149, prohibits checks or drafts on bankers being post dated. See *Snaith v. Mingay*, 1 M. & S. 87. *Crutchley v. Clarence*, 2 M. & S. 90, *ante*, 368.

Effect of  
laches of  
indorser.

If the holder of a bill of exchange, which has been presented for acceptance and dishonored, transfer it without giving notice of the dishonor to the indorser, or the drawer, the drawer is discharged as to the indorser, on account of the *laches* of the latter in not giving him notice; but the indorsee may sue all parties to the bill, including the drawer; for there is nothing on the face of an unaccepted bill to awaken a suspicion that it has been presented for acceptance and refused; and if the indorsee gives a valuable consideration for it and takes it innocently, he is not guilty of any breach of duty towards the drawer, and is therefore not affected by the omission of the indorser.<sup>a</sup>

\*408 But if the indorsee had notice of the dishonor at the time that he took the bill, he would not be entitled to recover from the drawer; as where *A.* for the accommodation of *B.* indorsed two bills drawn by *B.* in favor of *A.*, *B.* gave both the bills to *C.*, who entered into an agreement with *A.* that if one of these bills should be paid, *A.* should be exonerated from the other. One of the bills was subsequently paid by *A.*, the other was presented for acceptance and dishonored; after which it was \*indorsed by *C.* to the plaintiff, *with notice of the dishonor*. The plaintiff having sued *A.* on the bill, the court held, that having taken the bill after notice of dishonor, he took it with all its infirmities, one of which was the agreement between the defendant and *C.*, which, as it would be a good defence in an action by *C.*, was also an answer to the present action.<sup>b</sup>

If a party  
to a bill be  
once dis-  
charged,  
he is al-  
ways dis-  
charged.

A person who has once been discharged by laches from his liability on a bill, is always discharged. Where acceptance was refused, and the holder gave no notice thereof; and when the bill became due the holder presented it for payment, which also was refused; after which he called upon an indorser, who, being ignorant of the laches of the holder, paid the bill, and sued a previous indorser, who set up the laches of the holder as a defence; it was urged that the plaintiff ought not to be prejudiced by the laches of a subsequent holder, without means of information; but the court held, that his ignorance of such laches when he paid the bill, could not revive the liability of the defendant, who had been discharged by the same laches.<sup>c</sup>

The trans-  
ferree of  
an over-  
due bill,  
has only  
the same  
rights in  
respect of  
it which

8.—*Transfer of an overdue bill.*] A bill or note may be transferred either by indorsement or delivery after it becomes due; but a man who takes a bill or note *after it becomes due*, takes it subject to all the objections and equities affecting the instrument itself, and to which it was liable in the hands of the person from whom he takes it. “After a bill or note is due it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it; if he takes it, though he gives a full con-

<sup>a</sup> O'Keefe v. Dunn, 6 Taunt. 305. (1 Eng. C. L. 392.) *Dissentiente*, Chambre, J., but affirmed in Error, 5 M. & S. 282.

<sup>b</sup> Crossley v. Ham, 13 East, 498.

<sup>c</sup> Roscoe v. Hardy, 12 East, 434.

sideration for it, he takes it on the credit of the indorser, and sub- the trans-  
 ject to all the equities with which it may be encumbered.”<sup>a</sup> “It ferrer had.  
 has never been determined that a bill or note is not negotiable  
 after it is due, but if there are any circumstances of fraud in  
 the transaction, and it is indorsed to the plaintiff after it is due,  
 I have always left it to the jury, upon the slightest circum-  
 stance, to presume that the indorsee was acquainted with the  
 fraud.”<sup>b</sup> Where *D.* drew a note payable \*to *S.* or order, who \*409  
 indorsed it to *T.*, who had it presented and noted for non-pay-  
 ment, *D.* paid the money to *S.*, who took up the note from *T.*,  
 and instead of returning it to *D.* he indorsed it to *B.* who sued  
*D.* thereupon; held, that *B.* was not entitled to recover, for as  
 he took it after it became due, he took it on the credit of the  
 person from whom he received it, and he must stand in the  
 situation of such person. Whatever would be a defence against  
 the giver, would be a defence against the receiver.<sup>c</sup> Where *A.*  
 made a note for the accommodation of *B.*, who indorsed it to  
*C.* after it was dishonored, and *C.* indorsed it to *D.*; held, that  
*D.* could not sue *A.* on it; for, as *B.* had given no consideration  
 to *A.* for it, he could not enforce payment from him, and *C.*  
 and *D.* took the note subject to all the equities with which it  
 was incumbered in *B.*’s hands.<sup>d</sup>

But where *A.*, being indebted to his banker, deposited with  
 him an accommodation acceptance by *B.*, as a security, and  
 when the bill became due, the balance between *A.* and the  
 banker was in favor of *A.*; but *A.* failed some time afterwards  
 indebted to his banker, the bill still continuing in the possession  
 of the latter; held, that the banker might sue *B.*, the acceptor,  
 on the bill; for, as the bill had been sent *on account*, which  
 must have meant a floating account, and was suffered to re-  
 main after a period at which it might have been demanded  
 back, the plaintiff’s claim revested, when by fresh advances the  
 balance turned in his favor. The court said that as the acceptor  
 did not demand it back when it became due, it implied that he  
 considered himself to be a surety.<sup>e</sup>

So where *A.* deposited a bill, which was accepted for the  
 accommodation of the drawer, in the hands of his banker, as a  
 security for advances, and before it was due the bankers re-  
 turned it to *A.* The bill having been dishonored, *A.* returned  
 \*it to the bankers, but in the mean time he bought a ship from \*410  
 the drawer, and agreed to give up the bill in part payment;

<sup>a</sup> Per Lord Ellenborough, in *Tinson v. Francis*, 1 Campb. 19.

<sup>b</sup> Per Buller, J., in *Taylor v. Mather*, 3 T. R. 83, n.

<sup>c</sup> *Brown v. Davis*, 3 T. R. 80. Lord Kenyon differed from the rest of the court in this case; he thought that, unless notice of the dishonor could be brought home to the indorsee, he ought not to be affected by it. But in *Boehm v. Sterling*, 7 T. R. 420, his lordship said it made no difference whether the indorsee had notice of the dishonor or not.

<sup>d</sup> *Tinson v. Francis*, 1 Campb. 19.

<sup>e</sup> *Attwood v. Crowdie*, 1 Stark. 483. (2 Eng. C. L. 477.)

held, that the bankers might notwithstanding sue the acceptor, for when the bill was returned to them, they returned to their former right; they held it for value before it was due; and their right revested.<sup>a</sup> And where a bill was accepted for the accommodation of the drawer, who indorsed it after it became due; in an action by the indorsee against the acceptor, the defendant pleaded that the plaintiff took it after it became due, knowing that it was an accommodation bill. On demurrer, the court held, that there being no fraud or collusion alleged, the plea was bad, and gave judgment for the plaintiff.<sup>b</sup> Where the drawer of a bill payable to his own order settled with the acceptor after it became due, and gave him a receipt in full for all demands, and the drawer afterwards indorsed the bill to the plaintiff; held that the latter could not recover from the acceptor.<sup>c</sup>

As the indorsee of an overdue bill takes it with all the infirmities which affect the title of the indorser, so is he entitled to all the advantages of the party from whom he has received it. As where a bill was accepted for a debt contracted on a smuggling transaction, and indorsed for a valuable consideration before it was due to a *bona fide holder*, who indorsed it *after it became due* to the plaintiff; held, that as the indorser might have sustained an action on it against the acceptor, so might the indorsee, and that it was not competent to the defendant to set up the illegality of the original consideration as against the \*plaintiff, though it would be a good defence to an action by the payee.<sup>d</sup>

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But the indorsee of a bill or note overdue is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters; therefore in suing the maker he is not liable to a set off in respect of a debt due from the indorsee to the maker, and which would be available against the indorser.<sup>e</sup> A note payable on demand is not open to the same suspicion as a note overdue, and therefore without evidence of payment having been demanded and refused, it is not to be considered as such.<sup>f</sup> A note payable on demand

<sup>a</sup> *Bosanquet v. Dudman*, 1 Stark. 1. (2 Eng. C. L. 267.)

<sup>b</sup> *Charles v. Marsden*, 1 Taunt. 224. There is a *quære* added to this in *Bayley*, 501, and it seems difficult to reconcile it with *Tinson v. Francis*, *ante*, 409. In a note in *Chitty*, 241, the ground of this decision is supposed to be that the drawee who accepts for the accommodation of the drawer does not limit the accommodation to *any particular time*, and by suffering it to remain in the drawer's possession, impliedly authorises him to make use of the bill at any time till he rescinds the authority; that consequently he cannot refuse to pay a holder for value, on the ground of the bill having been transferred after it was *nominally payable*. See *Collenridge v. Farquharson*, 1 Stark. 259. (2 Eng. C. L. 381.) *Buzzard v. Flecknoe*, *Id.* 333. (2 Eng. C. L. 414.)

<sup>c</sup> *Thorogood v. Clark*, 2 Stark. 251. (3 Eng. C. L. 337.)

<sup>d</sup> *Chalmers v. Lanion*, 1 Campb. 383.

<sup>e</sup> *Burrough v. Moss*, 10 B. & C. 559. (21 Eng. C. L. 128.) 5 M. & R. 296.

<sup>f</sup> *Barough v. White*, 4 B. & C. 325. (10 Eng. C. L. 345.) See *Goodall v. Ray*, 1 H. & W. 333, *post*, 428.

*with interest until paid*, having been indorsed two years and an half after its date, held that the indorsee might sue upon it;<sup>a</sup> and so where it was indorsed nine years after the date.<sup>b</sup>

9.—*Transfer of an overdue check.*] The rule as to bills and notes taken when overdue, is not strictly applicable to checks upon bankers. Where the owner of a check for 50*l.* lost it, and five days after the date it was passed to a shopkeeper, who received the amount at the bank; held, that the owner who lost it, might recover the amount from the shopkeeper. Abbott, C. J., observed, “that an instrument of this nature coming into the hands of a party so long after its date, is to be considered in the same light as a bill of exchange overdue, and in such case it is incumbent on the party who takes the instrument under such circumstances, to show that the party from whom he took it had a good title.” Holroyd, J., “a check is payable immediately, and the holder of it keeps it at his peril, and the person taking it after it is due takes it also at his peril.”<sup>c</sup> But \*in a subsequent case, where the defendant took two checks six days after the date from a person who obtained them through fraud, in an action by the drawer, Lord Tenterden said, “It cannot be laid down as a matter of law, that a party taking a check after any fixed time from its date does so at his peril; and, therefore, the mere fact of the defendant having taken the checks six days after they bore date from a person who had not given value for them, did not entitle the plaintiff to a verdict.” Littledale, J., “Though the rule of law certainly is that a party taking a bill or note overdue, has it with the same title and no other as the person from whom he receives it, I think the same rule cannot be applied to checks.”<sup>d</sup>

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10.—*Transfer after payment.*] Bills and notes are negotiable *ad infinitum* until paid by the acceptor or maker, unless the negotiation would have the effect of making one of the parties liable who would otherwise be discharged. Where *A.* drew a bill on *B.* payable to the order of *A.*, who indorsed it over, *B.* having dishonored his acceptance, *A.* took up the bill and indorsed it again to the plaintiff, who sued *B.*; held, that he was entitled to recover from *B.* Lord Ellenborough: “A bill of exchange is negotiable *ad infinitum* until it has been paid by or discharged on behalf of the acceptor. If the drawer

A bill is transferable until paid by the acceptor.

<sup>a</sup> Gascoyne v. Smith, M'Clel. & Y. 338.

<sup>b</sup> Morris v. Lee, Chitty, 79; but see Banks v. Colwell, 3 T. R. 81.

<sup>c</sup> Down v. Halling, 4 B. & C. 330. (10 Eng. C. L. 347.) But the decision of the court in this case, as to the question for the consideration of the jury, under such circumstances, has been overruled, see *ante*, 400. See Boehm v. Sterling, 7 T. R. 423.

<sup>d</sup> Rothschild v. Corney, 9 B. & C. 388. (17 Eng. C. L. 402.) It is apprehended that since the decision of Crook v. Jadis, 5 B. & Ad. 909, (27 Eng. C. L. 234,) *ante*, 400, the proper question for the jury in such cases is, whether the party taking the check has been guilty of gross negligence.



has paid the bill, it seems that he may sue the acceptor on it; and if instead of suing the acceptor he put it in circulation on his own indorsement only, it does not prejudice any of the other parties who have indorsed the bill, that the holder should be at liberty to sue the acceptor. The case would be different if the circulation of the bill would have the effect of prejudicing any of the indorsees.”<sup>a</sup> But where *A.* drew a bill on *B.* payable to *C.* or order, and *B.* having dishonored his acceptance, *A.* took up the bill and indorsed it to *D.*, who sued *B.* on it; held, that he could not recover. Per Lord Mansfield, “When a draft is given payable \*to *A.* or order, the purpose is, that it shall be paid to *A.* or order, and when it comes back unpaid, and is taken up by the drawer, it ceases to be a bill. If it were negotiable here, *C.* would be liable, for which there is no color.”<sup>b</sup>

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If paid before due it may be afterwards indorsed.

A bill or note may be paid before it is due by any person, and afterwards indorsed before it arrives at maturity. Where a bill so paid was indorsed to a *bona fide* holder for valuable consideration, held that he might recover from the payee, notwithstanding the payment, there being nothing on the bill to show such payment, or to awaken the suspicion of the holder; payment did not extinguish it more than discounting would; whilst its time was running it remained negotiable.<sup>c</sup> The party paying, therefore, should take care to note the payment on the bill.

When paid by the acceptor.

When a bill has been paid by the acceptor, it is *functus officio* at common law, and by the express provisions of the stamp laws no longer reissuable.<sup>d</sup> But the maker of promissory notes, payable to bearer on demand, for any sum not exceeding 100*l.*, (being duly licensed for that purpose,)<sup>e</sup> may reissue the same from time to time after payment, as often as he thinks fit.<sup>f</sup>

Effect of transfer after part payment.

A bill or note cannot be indorsed for less than the full sum appearing to be due thereon.<sup>g</sup> But the indorser of a bill of exchange, having received part of the contents from the drawer, cannot recover more than the residue from the acceptor;<sup>h</sup>

<sup>a</sup> Callow v. Lawrence, 3 M. & S. 97. Hubbard v. Jackson, 4 Bing. 390, (15 Eng. C. L. 12,) S. P.

<sup>b</sup> Beck v. Robley, 1 H. Bl. 89, *n.* The court adverting to this case in Callow v. Lawrence, said, that if the bill had been negotiable, it would have the effect of rendering *C.* liable upon his indorsement, which in point of law was discharged by *A.* taking the bill up, and the bill could not be negotiable by striking out *C.*'s indorsement, which distinguished it from that case where the bill was made payable to the drawer. It follows from Beck v. Robley, that a bill once paid cannot be negotiated, if the effect of the negotiation would be to render a party liable who would otherwise be discharged.

<sup>c</sup> Burbridge v. Manners, 3 Campb. 194.

<sup>d</sup> Chitty, 240. 55 G. III, c. 184, s. 19.

<sup>e</sup> *Id.* s. 24.

<sup>f</sup> *Id.* s. 14 & 15.

<sup>g</sup> Hawkins v. Cardy, Lord Raym. 360. But if the part of the bill be received, it may be indorsed over for the remainder. *Id.*

<sup>h</sup> Bacon v. Searles, 1 H. Bl. 88.

and if the acceptor were to pay the bill after notice that the \*drawer had paid it, the drawer might recover the money so paid from the acceptor.<sup>a</sup> If a bill or note be transferred for part of the sum due on it, and the amount for which it is transferred does not appear thereon, the assignee may sue the acceptor or maker for the whole amount, and he is a trustee of the surplus for the assignor.<sup>b</sup> \*414

A bill of exchange was drawn by *A.* on *B.* and indorsed to *C.*, the bill was not satisfied when due, but part payments were afterwards made by the drawer and acceptor. Two years after it became due, *D.* paid the balance to *C.*, the holder, who indorsed the bill, and wrote a receipt on it in general terms; held, that parol testimony was admissible to explain the receipt, and it appearing by such evidence that *D.* paid the balance, not on account of the acceptor or drawer, but in order to acquire an interest in the bill as purchaser, it might be indorsed by *D.* after it became due, so as to give the indorsee all the rights which *C.*, the holder, had before the indorsement, and such indorsee might recover from the drawer the balance unpaid by him.<sup>c</sup>

It is a general rule, that no title can be obtained through forgery. Where a promissory note delivered by the defendant to the plaintiff, payable to plaintiff's order, was stolen from the plaintiff by his clerk, who, after forging the plaintiff's indorsement, obtained payment of the defendant's banker, who handed the note to the defendant: held, that the plaintiff was entitled to recover the amount of the note in an action of trover, though the defendants had no notice of the forgery until six weeks after it had come into their possession, it not appearing that the plaintiff had been guilty of negligence.<sup>d</sup> If, however, a bill or check be drawn in so careless and improper a manner, as thereby to enable a third person to practise the fraud, then the drawer must bear the loss. A customer of the banker, on leaving home, entrusted his wife with several blank forms of checks, signed by himself, and \*desired her to fill them up, according to the emergency of his business. She filled up one with the words "fifty pounds two shillings," beginning the word "fifty" with a small letter in the middle of a line, the figures 52 2, were also placed at a considerable distance to the right of the printed £. She gave the check thus filled up to her husband's clerk to get it cashed, who inserted the words "three hundred" before the word "fifty," and the figure 3 between the printed £ and the figures 52 2. He then presented it at the banker's, who paid 350*l.* 2*s.* on it; held, that the loss should fall on the customer and not on the banker, for though it was a well established rule, that the banker, and not

Rights of the transferee of a forged bill or note.

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<sup>a</sup> Per Lord Loughborough, C. J., *id.* 89.

<sup>b</sup> Reid v. Furnival, 5 C. & P. 499. (24 Eng. C. L. 427.) 1 C. & M. 538.

<sup>c</sup> Graves v. Key, 3 B. & Ad. 313. (23 Eng. C. L. 79.)

<sup>d</sup> Johnson v. Windle, 3 Bing. N. C. 225. (32 Eng. C. L.)

the customer, must suffer if payment be made without authority, as the banker is bound to be acquainted with the handwriting of his customers, yet if it be the fault of the customer that the banker pay more than he ought, the former must bear the loss, and the careless and incautious manner in which this check was filled up, invited the forgery and misled the bankers. <sup>a</sup>

Money paid by mistake on a forged instrument may be recovered back.

Where money is paid through a mistake on a forged instrument, it may be recovered back in an action for money had, &c.; see title, "Money had and received."<sup>b</sup> Every fraudulent alteration in a bill or note, whether by subtraction, addition, or substitution, is forgery.<sup>c</sup> So the discharging one indorsement, and the insertion of another, is a forgery.<sup>d</sup> To sign the name of a fictitious or non-existing person is a forgery.<sup>e</sup> It is also a forgery to sign a man's own name with intention that the signature should pass for the signature of another person of the same name.<sup>f</sup> Making a mark, and suffering the assumed name to be written against it is forgery.<sup>g</sup> But where the drawer of a bill subscribed himself "Thomas Wilson," his real name being "Thomas Wilson Richardson," it was held not <sup>\*416</sup> to be a forgery in the absence of evidence of an intention to defraud.<sup>h</sup>

## SECTION VII.

### PRESENTMENT FOR ACCEPTANCE.

Presentment should be made in all cases.

WHERE a bill of exchange is made payable within a specified time *after sight*, or *after demand*, it is *necessary*, in order to fix the time when payment is to be made, to present it to the drawee for acceptance, for otherwise the time of payment would never arrive; but in other cases it is not necessary to present the bill before it is due.<sup>(1)</sup> It is, however, most advisable in all cases to endeavor to get the bill accepted, as by that means the holder obtains the additional security of the drawee upon the bill itself, and which consequently becomes more negotiable; and if the drawee refuse to accept, the drawer and the indorser

<sup>a</sup> Young v. Grote, 4 Bing. 258. (13 Eng. C. L. 422.) 12 Moore, 484.

<sup>b</sup> Ante, 58.

<sup>c</sup> 11 Geo. IV, & 1 W. IV, c. 66. See Rose v. Elworthy, Bayley, 547. R. v. Treble, 2 Taunt. 328.

<sup>d</sup> See ante, 388. "Alteration." R. v. Birkett, R. & R. 251.

<sup>e</sup> R. v. Hales, 17 St. Trials, 161. R. v. Parkes and others, 2 Leach, 775.

<sup>f</sup> Mead v. Young, 4 T. R. 28, ante, 401.

<sup>g</sup> R. v. Dunn, 1 Leach, 57. 2 East, P. C. 962.

<sup>h</sup> Schultz v. Astley, 2 Bing. N. C. 544. (29 Eng. C. L. 414.) 1 Hodges, 425, ante, 399.

(1) (Bachelior v. Priest, 12 Pick. 399.)

may immediately be sued.<sup>(1)</sup> It is said, that it is incumbent on the holder, who is a mere agent, and on the payee when directed by the drawer to do so, to present it for acceptance as soon as possible; and if any loss should arise from their neglect to do so, as by the drawee failing in the interim, the agent might be answerable in damages to his principal, and the payee might lose his remedy on the bill.<sup>a</sup>

There is no rule respecting the time within which bills payable so many days after sight should be presented; but they must be presented within *a reasonable time*, "which is a mixed question of law and of fact."<sup>b</sup> Within a reasonable time.

Where a bill payable in India sixty days after sight, was presented twenty-six days after it had arrived there, the jury found that it was presented within a reasonable time, and the court refused to disturb their verdict. Eyre, C. J. "The courts have been very cautious in fixing any time for presenting for acceptance an inland bill payable at a certain period after sight, and it seems to me more necessary to be cautious with respect to a foreign bill. I think, indeed, that \*the holder is bound to present it within a reasonable time; and what is a reasonable time must depend on the circumstances of the case; and it must always be for the jury to determine whether any laches are imputable to the plaintiff." Buller, J. "The only rule I know of, which can be applied to the case of bills of exchange is, *that due diligence* must be used. Due diligence is the only thing to be looked at, whether the bill be foreign or inland; and whether it be payable at sight, or so many days after, or in any other manner. But I think a rule may thus far be laid down as to laches, with regard to bills payable at sight, or a certain time after sight; *namely, that they ought to be put in circulation.*"<sup>c</sup> "For if bills are circulated, the parties are known to the world, and their credit is looked to; and if a bill drawn at three days' sight, were kept out in that way for a year, I cannot say that there would be laches. But if instead of putting it into circulation, the holder were to lock it up for any length of time, I should say that he was guilty of laches."<sup>d</sup>

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Where a bill was drawn in London, on Lisbon, on the 12th of May, and circulated in France, and not presented for acceptance until the 22d of August, following; this was not considered an unreasonable delay.<sup>e</sup> So where the plaintiff received a bill twenty miles from London, on Friday morning, drawn on a banker in London, one month after sight, and the bill was

<sup>a</sup> Chitty, 300.

<sup>b</sup> Per Lord Tenterden, in *Shute v. Robins*, M. & M. 133, (14 Eng. C. L. 215,) *post*, 418.

<sup>c</sup> *Muilman v. D'Egnino*, 2 H. Bl. 365.

<sup>d</sup> Per Gibbs, C. J., in *Goupy v. Harden*, 7 Taunt. 162, (2 Eng. C. L. 60,) *ante*, 350.

<sup>e</sup> *Id.*

(1) (*Evans v. Gee*, 11. Peters, 80.)

not presented for acceptance until Tuesday, on which day the banker stopped payment and acceptance was refused; the jury having found that it was presented within a reasonable time, the court concurred.<sup>a</sup>

Due diligence is a mixed question of law and fact.

\*418

Where a bill drawn by bankers in the country on their correspondents in London, payable twenty days after sight, was delivered to a traveller of the plaintiffs' on the 17th of November, who transmitted it to the plaintiffs at Bristol on the 24th, and on the 29th it was presented for acceptance in London, but the drawer, having failed on the 24th, acceptance was refused. Lord Tenterden, C. J.: "The only question is whether the plaintiffs \*or their servant used due diligence in forwarding the bill. *This is a mixed question of law and fact*, and in expressing my own opinion, I do not wish at all to withdraw the case from the jury. The bill was certainly long enough in the hands of the plaintiffs and their traveller to enable them to forward it London in the regular course of business, and get it accepted before the drawees refused to accept it. But whatever strictness may be required with respect to common bills of exchange it does not seem unreasonable to treat bills drawn by bankers on their correspondents as not requiring immediate presentment; but as being retainable by the holders for the purpose of using them, within a moderate time, (for indefinite delay, of course, cannot be allowed,) as part of the circulating medium of the country. If this be so, the delay in the present case does not seem unreasonable;" and of this opinion was the jury.<sup>b</sup> So where the purchaser of a bill on Rio de Janeiro at sixty days after sight, had kept it in his own hands for five months, the rate of exchange having fallen after he had bought it, and the drawee had become insolvent before it was presented; held, that the jury were properly directed to consider whether, looking at the situation and interests of both the drawer and the holder, there had been unreasonable delay on the part of the holder. Tyndal, C. J.: The bill must be forwarded within a reasonable time, and there must be no unreasonable or improper delay. Whether there has been in any particular case reasonable diligence used, or whether an unreasonable delay has occurred, *is a mixed question of law and fact* to be decided by the jury, acting under the direction of the judge upon the particular circumstances of each case."<sup>c</sup>

Mode of making presentment.

Presentment should, in all cases, be made during the usual hours of business.<sup>d</sup> It should be made to the drawee himself or his authorised agent. Presentment to a person at the drawee's house who is unknown to the person who presented it, is not sufficient.<sup>e</sup> When the bill is presented for acceptance

<sup>a</sup> Fry v. Hill, 7 Taunt. 397. (2 Eng. C. L. 152.)

<sup>b</sup> Shute v. Robins, M. & M. 133. (14 Eng. C. L. 215.)

<sup>c</sup> Mellish v. Rawdon, 9 Bing. 416. (23 Eng. C. L. 319.) 2 M. & Scott, 570.

<sup>d</sup> Marius, 112. See "Presenting for Payment," *post*.

<sup>e</sup> Cheek v. Roper, 3 Esp. 175.

the holder may leave it with the drawee twenty-four hours to \*consider whether he will accept it or not, unless the post goes out in the interim;\* unless, in the interim, he accept or declare a determination not to accept.<sup>b</sup> If the bill be directed to the drawee at a particular place, and it appears that he never lived there, or has absconded, the bill is to be considered as dishonored.<sup>c</sup> But if he has only removed, the holder should endeavor to find him out; and in all cases, he should make every possible inquiry; and whether he has used due diligence in that respect is a question for the jury.<sup>d</sup> If the drawee is dead the holder should endeavor to find out his personal representative and present the bill to him.<sup>e</sup> \*419

SECTION VIII.

ACCEPTANCE.

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1.—*Form of acceptance.* | An acceptance is an engagement by the drawee to pay the bill when due.<sup>f</sup> Every acceptance of an *inland* bill must be in writing upon the bill, or if there be several parts of such bill, on one of such parts.<sup>g</sup> When the drawee accepts a bill, the most usual mode is to write “accepted,” and subscribe his name; but the drawee’s signature alone is sufficient, so is the word “accepted,” “presented,” “seen,” or any writing of the drawee which evinces a consent to comply with the request of the drawer, and it will be for the jury to say whether the words \*written on the bill by the drawee was intended to operate as a complete acceptance.<sup>h</sup> If the drawee underwrites a bill, “presented such a day,” or only “the day of the month,” it is such an acknowledgement of the bill as amounts to an acceptance.<sup>i</sup> When an acceptance is made by one partner only on the partnership ac- Mode of accepting an inland bill. \*420

<sup>a</sup> Marius, 15.  
<sup>b</sup> Ingram v. Foster, 2 Smith, 243. And if more than that time be given, the holder ought to inform the indorser thereof. *Per Curiam, id.*  
<sup>c</sup> *Anon.* Lord Raym. 743.  
<sup>d</sup> Collins v. Butler, 2 Stra. 1067. Bateman v. Joseph, 12 East, 433.  
<sup>e</sup> Chitty, 307.  
<sup>f</sup> Per Lawrence, J., in Clark v. Cock, 4 East, 72.  
<sup>g</sup> 1 & 1 Geo. IV, c. 78, s. 2. <sup>h</sup> Dufaur v. Oxenden, 1 M. & Rob. 90.  
<sup>i</sup> *Anon.* Comb. 401. Powell v. Morrison, 1 Atk. 64.



count, he should express that he accepts it for himself and partner, or subscribe the name of the firm. If by an agent for his principal, he should specify the character in which he accepts it.<sup>a</sup>

By the practice of London bankers, if one banker who holds a check drawn on another banker presents it after four o'clock, it is not then paid, but a mark is put upon it to show that the drawer has effects; and this mark binds the bankers to pay on the next day at the clearing house.<sup>b</sup>

Accept-  
ance of a  
foreign  
bill need  
not be in  
writing.

2.—*Form of accepting foreign bills.*] As the 1 & 2 G. IV, c. 78, does not apply to foreign bills, the acceptance of such bills need not be in writing on the bill, it may be verbal; a mere promise either by parol<sup>c</sup> or in writing, to accept a foreign bill will amount to an acceptance. Where funds were placed in the hands of partners to meet bills which they were to accept, but when the bills were left for acceptance, no acceptance was written on them; and on this matter being mentioned to one of the partners, he said, "What, not accepted, we have had the money, and they ought to have been paid, but I do not interfere, you should see my partner;" held, an acceptance.<sup>d</sup> Where the drawer of a bill of exchange sent a letter of advice to the drawee, who returned an answer, saying, "that the bill should be duly honored, and placed to the drawer's credit;" held, an acceptance.<sup>e</sup> So, where the drawee of a bill who had refused to accept it when presented, afterwards, but before the \*bill became due, wrote a letter to the drawer, saying that his prospects having much improved, "he should accept or certainly pay the bill," which letter did not reach the drawer until after the bill was due; held, that the letter amounted to an acceptance, for a promise to accept or pay an existing bill was an acceptance; and it was immaterial that the letter did not reach the drawer until after the bill was due, for an acceptance after the time appointed for payment was good;<sup>f</sup> where in an answer to a letter by the drawer, the drawee assured him that the bills he had drawn on him "would meet with due honor;" which answer was communicated by the drawer to his bankers, who on the faith thereof advanced to him the full amount of the bills. The effects which the drawer had sent to the drawee to meet these bills, having been attached in his hands, he refused to accept the bills by the advice of the drawer; held, notwithstanding, that he was bound to pay the bills as acceptor, for his promise amounted to an acceptance which induced a credit, without which the plaintiff would not have given value for the bills.<sup>g</sup>

<sup>a</sup> See *ante*, 350.

<sup>b</sup> Robson v. Bennett, 2 Taunt. 388.

<sup>c</sup> Fox v. Coleman, Bayley, 174. Lumley v. Palmer, Stra. 1000. Per Lord Mansfield, in Pillans v. Van Mierop, Burr. 1662. Per Lawrence, J., 4 East, 72.

<sup>d</sup> Fairlie v. Herring, 3 Bing. 625. (13 Eng. C. L. 78.)

<sup>e</sup> Powell v. Monnier, 1 Atk. 611.

<sup>f</sup> Wynne v. Raikes, 5 East, 514.

<sup>g</sup> Clarke v. Cock, 4 East, 57. Wilkinson v. Lutwidge, Stra. 649. As to constructive acceptances, see *verba* Bayley, J., 2 B. & A. 33.

But where the drawee answered to an application to accept a bill, by saying "the bill should have his attention;" it was held, that these words were ambiguous, and did not amount to an acceptance.<sup>a</sup> So an answer by a drawee in these words—"There is your bill, it is all right," was held, not to amount to an acceptance.<sup>b</sup> Where the drawee of a bill of exchange who once refused to accept it, said to the holder afterwards, "if you will send it to the counting-house again I will give directions for its being accepted;" held, that he was not liable without proof that the bill was sent again to the counting-house for acceptance.<sup>c</sup> Where the drawees refused to accept, and after the bill was protested, it was again presented, when one of them said, "this bill will be paid, but we cannot allow you for a duplicate protest," upon which the person who presented it, \*said that he could not receive payment without all the charges; \*422 held, that it did not amount to an acceptance, for the words, "this bill will be paid," were said with reference to immediate payment, not future payment; the drawees did not think of giving a pledge, or the clerk who presented the bill of receiving one.<sup>d</sup>

But a promise to accept a bill not drawn, will not amount to an acceptance after it is drawn: at least, unless some person be induced to take the bill on the faith of such promise.<sup>(1)</sup> *A.* having applied to *B.* for the price of goods which he had sold him, *B.* told him to draw on him for the amount at two months. *A.* accordingly drew a bill payable to his own order at two months, and indorsed it to the plaintiff. The bill never was presented for acceptance to *B.*, nor accepted by him; held, in an action by the indorsee, that *B.* was not liable; for a promise to accept a *non existing* bill, did not amount to an acceptance of the bill when drawn. Lord Kenyon said, that admitting that such a promise would operate as an actual acceptance, even though a third person was thereby induced to take the bill, was carrying the doctrine of implied acceptances to the utmost verge of the law, and he doubted whether it did not go beyond the proper boundary.<sup>e</sup>

Where a foreign bill had been sent to the drawee for accept-

<sup>a</sup> *Rees v. Warwick*, 2 B. & A. 113.

<sup>b</sup> *Powell v. Jones*, 1 Esp. 17.

<sup>c</sup> *Anderson v. Hide*, 3 Camp. 179.

<sup>d</sup> *Anderson v. Heath*, 4 M. & S. 303.

<sup>e</sup> *Johnson v. Collings*, 1 East, 98. In *Pillans v. Van Mierop*, 4 Burr. 1663, it was decided that a promise to accept a bill not then drawn, amounted to an acceptance after it was drawn, a third party having given credit to the bill, on such promise; it may also be inferred from that case, that a promise to accept made on an executory consideration is in no case binding, so long as such consideration remains executory, unless it influence some person to take or retain the bill. Bayley, 187.

(1) (A promise to accept a bill, thereafter to be drawn, specifying the amount and time of payment, so as to leave no reasonable doubt as to the identity of the bill, intended to be accepted, and shown to a third person, who, on the faith of such promise, takes the bill for a valuable consideration, is, in point of law, an acceptance binding the person who makes the promise. *Parker v. Greele*, 2 Wend. 545. See also *Ontario Bank v. Worthington*, 12 Wend. 493.)

Effect of  
detaining  
a bill left  
for accept-  
ance.

\*423

ance, and he detained it for three months without accepting it or giving notice of a refusal; several letters having in the mean time been sent to him by the drawer, pressing him to write an acceptance on it, and saying that he considered his detention of it as amounting to an acceptance; but when the bill was protested for non-payment, he said, "he had neglected to write an acceptance on it, thinking it of no consequence as he meant to pay it;" \*held, that his conduct and admissions amounted to an acceptance.<sup>a</sup> But in a subsequent case, where a bill was sent by post to the drawee for acceptance, and he detained it for ten days, when he gave notice that he would not accept it, as he had not received the remittance on account of which he was to accept it, and after a further interval of sixteen days he returned it; held, that the drawee was not under the circumstances liable as acceptor. Abbott, C. J.: "It has been said that, if the drawee detains a bill left with him for acceptance, for an unreasonable time, such detention amounts in point of law to an acceptance, and the opinions of great and learned men have been cited in support of that doctrine. It is not, however, supported by the authority of any decided case; for the cases which have been referred to in the course of argument, have all been decided upon very special circumstances."<sup>b</sup>

Where a bill was presented for acceptance and refused, but remained afterwards for a considerable time in the hands of the drawee, who ultimately destroyed it; held, (*dissentiente*, Lord Ellenborough,) that the destruction of the bill was not tantamount to an acceptance. Holroyd, J., thought that in general, destruction was equivalent to acceptance, but here there had been a previous refusal to accept. Bayley, J., doubted whether in any case destruction would do more than subject to an action of trover.<sup>c</sup>

3.—*A qualified or conditional acceptance.*] A general acceptance is an absolute engagement on the part of the acceptor to pay the bill according to the tenor and effect thereof. But the drawee may so qualify his acceptance as to subject him to payment on certain conditions only, which is termed a conditional acceptance, or he may accept it absolutely for part payment of the amount, or for payment at a different time, in which case it is termed a partial or varying acceptance.

\*424  
Holder  
not bound  
to take

\*The holder of the bill, however, is not bound to receive a limited and qualified acceptance; he may refuse it and resort to the drawer, but if he does receive it, he must conform to the terms of it.<sup>d</sup>(1) If he acquiesces in it, he ought to give im-

<sup>a</sup> Harvey v. Martin, 1 Camb. 425.

<sup>b</sup> Mason v. Barff, 2 B. & A. 26.

<sup>c</sup> Jenne v. Ward, 1 B. & A. 653. It seems singular that it should ever have been supposed that the tortious act of destroying a bill, which is calculated to defeat the remedy on the bill, should have been deemed evidence of a contract on the part of the drawee to pay the bill to the holder. Chitty, 325.

<sup>d</sup> Gammon v. Schmoll, 5 Taunt. 353. (1 Eng. C. L. 128.)

(1) (*Campbell v. Pattengill*, 7 Greenleaf, 126.)

mediate notice to all the parties to the bill, otherwise they may be discharged from all liability.<sup>a</sup> If he means to refuse it, he should protest it, and give notice thereof to the other parties. But a protest will exclude him from availing himself afterwards of the drawee's offer.<sup>b</sup>

An acceptance by the drawee of a bill to pay "as remitted for;"<sup>c</sup> or to pay "on account of the ship Thetis when in cash for the said vessel's cargo;"<sup>d</sup> or "as soon as he should sell certain goods,"<sup>e</sup> have respectively been held to be conditional acceptances. So an answer "that the bill would not be accepted until a navy bill was paid,"<sup>f</sup> or "until the ship with the wheat arrives from Scotland,"<sup>g</sup> has been held a conditional acceptance; which rendered the drawee liable as acceptor after the happening of these events respectively. The drawee of certain foreign bills being arrested by the indorsee, said that he would have accepted them when presented, but he had not the funds from France; that he had told the clerk of the indorsee that when he got the funds over from France the bills should be paid; held, a conditional acceptance; and it appearing that he had got the funds from France, he was bound to pay.<sup>h</sup> An absolute acceptance in writing may be qualified by a contemporaneous writing on a different paper, but the acceptor cannot avail himself of such condition as against an indorsee for a valuable consideration without notice thereof.<sup>i</sup> But a verbal condition cannot be admitted in evidence to qualify a written contract.<sup>j</sup>

\*425

4.—*A partial or varying acceptance.*] A partial acceptance varies from the tenor of the bill. As where it is made to pay part of the sum for which the bill is drawn; or to pay at a different time, or in a different manner, or at a different place.

Where a foreign bill was drawn for 127*l.* 18*s.* 4*d.*, and accepted for 100*l.* only; held, that it was no objection to its validity.<sup>k</sup> Where the drawee altered the time of payment from one month to two, and accepted it, the holder kept it two months, and then presented it for payment; held, that this was an acquiescence in the alteration, and the holder having

<sup>a</sup> Per Bayley, J., in *Sebag v. Abithol*, 4 M. & S. 466. It is true the holder is not bound to present a bill for acceptance, but I have always understood that if he does present it, and a qualified acceptance is given, he is bound to give notice. *Id.*

<sup>b</sup> *Sproat v. Mathews*, 1 T. R. 182. *Bentinck v. Dorrien*, 6 East, 200.

<sup>c</sup> *Banbury v. Lissett*, 2 Stra. 1212.

<sup>d</sup> *Julian v. Sholbroke*, 2 Wils. 9.

<sup>e</sup> *Smith v. Abbott*, Stra. 1152.

<sup>f</sup> *Pierson v. Dunlop*, Cowp. 571.

<sup>g</sup> *Miln v. Prest*, 4 Campb. 393.

<sup>h</sup> *Mendizabal v. Machado*, 6 C. & P. 218. (25 Eng. C. L. 365.) 3 M. & Scott, 841.

<sup>i</sup> *Bowerbank v. Monteiro*, 4 Taunt. 844.

<sup>j</sup> *Hoare v. Graham*, 3 Campb. 57. When the condition is performed, it becomes an absolute acceptance; in pleading, however, it must be declared upon as a conditional acceptance, with an averment that the condition has been fulfilled. *Langston v. Corney*, 4 Camp. 176.

<sup>k</sup> *Wegersloff v. Keen*, 1 Stra. 214.

brought an action on the case against the acceptor for mutilating the bill, he was nonsuited.<sup>a</sup> Where a bill was accepted, to be paid half in money and half in bills, it was held sufficient; for the drawee might refuse the bill totally, or accept it in part; but the holder was not bound to acquiesce in such acceptance.<sup>b</sup>

5.—*Place of payment.*] The 1 and 2 Geo. IV, c. 78, enacts that if any person shall accept a bill of exchange payable at a banker's or other place, without further expression in his acceptance, such acceptance shall be deemed a general acceptance of such bill; but if the acceptor shall in his acceptance express that he accepts the bill payable at a banker's house, or other place, and not otherwise or elsewhere, such acceptance shall be a qualified acceptance, and the acceptor shall not be liable to pay the bill, except in default of payment when such payment shall have been first duly demanded at such banker's house or other place."<sup>c</sup>

\*426 Before the passing of this act the effect of making a bill payable at any other place than the drawee's residence had been \*a matter of great controversy.<sup>d</sup> But now if the acceptance merely make the bill payable at a particular place, without any other expression, it is a *general acceptance*. If he states in the acceptance that the bill is payable there only, and not otherwise or elsewhere, it is a qualified acceptance.

If the bill be made payable at a particular place by the drawer, and accepted generally, that is a general acceptance.<sup>e</sup>

6.—*When acceptance may be made.*] An acceptance, like an indorsement, may be made on a blank stamp, and if made before the bill is drawn it will be no variance, though the declaration state the drawing to be first and the acceptance afterwards.<sup>f</sup> With respect to foreign bills, we have seen that a promise to accept before the bill is drawn is not tantamount to an acceptance after the bill has been drawn.<sup>g</sup> A promise to accept not communicated to the person who takes the bill, does not amount to an acceptance; but if the person be thereby induced to take a bill, he gains a right equivalent to an actual acceptance against the party who has given the promise to accept.<sup>h</sup>

We have seen that a bill may be accepted after the period at

<sup>a</sup> Paton v. Winter, 1 Taunt. 420. And see Walker v. Attwood, 11 Mod. 190.

<sup>b</sup> Petit v. Benson, Comb. 452.

<sup>c</sup> 1 & 2 Geo. IV, c. 78.

<sup>d</sup> Rowe v. Young, 2 Brod. & Bing. 165. (6 Eng. C. L. 53.) Fenton v. Goundry, 13 East, 459. Ambrose v. Hopwood, 2 Taunt. 61.

<sup>e</sup> Selby v. Eden, 3 Bing. 611. (13 Eng. C. L. 70.)

<sup>f</sup> Molloy v. Delves, 7 Bing. 428. (20 Eng. C. L. 190.) 4 C. & P. 492. (19 Eng. C. L. 491.) Leslie v. Hastings, 1 M. & Rob. 119. See Schultz v. Astley, 2 Bing. N. C. 544, (29 Eng. C. L. 414,) ante, 399.

<sup>g</sup> Johnson v. Collings, 1 East, 98, ante, 422. Pillans v. Van Mierop, ante, 422. Pearson v. Dunlop, Cowp. 573, ante, 424.

<sup>h</sup> Per Gibbs, C. J., Milne v. Prest, 3 Campb. 393. Holt, 181. (3 Eng. C. L. 67.)

which it is made payable has elapsed, and after a previous refusal to accept;<sup>a</sup> and in such a case the acceptor will be liable to pay the bill on demand, though in pleading, his liability may be stated to be according to the tenor and effect of the bill.<sup>b</sup>

7.—*By whom a bill should be accepted.*] Acceptance by one partner in the name of the firm, will be sufficient.<sup>c</sup> But if a bill be drawn on two or more, not being partners, it must be \*accepted by all, for it will be binding only on such as accept it.<sup>d</sup> There cannot be separate acceptors of the same bill; it can be only accepted by the drawee, or some person for the honor of the drawer. Where a bill was drawn on *A.*, who accepted it, and the drawer having required further security, *B.* wrote under *A.*'s acceptance "accepted," and signed his name. *B.* having been sued as acceptor, Lord Ellenborough said "that this was neither an acceptance by the drawee, or by any person for the honor of the drawer; that the defendant's undertaking was collateral, and ought to be declared on as such."<sup>e</sup> \*427

8.—*Liability of the acceptor.*] The acceptor of a bill is considered as the *principal debtor*, all the other parties to the bill are sureties that the acceptor shall pay the bill if duly presented.<sup>f</sup> If the acceptor omits to pay the bill, and one of the indorsers be obliged to pay, the acceptor will be liable to such indorser for the amount so paid by him for his use; and if the indorser has not paid the entire amount, the holder may sue the acceptor for the residue.<sup>g</sup> If the drawee accepted the bill for the accommodation of the plaintiff, and has received no value for it, he may resist the payment altogether, and show the circumstances under which it was accepted, or he may show that the bill was partly for value and partly for the accommodation of the plaintiff.<sup>h</sup> But he is liable even on an accommodation bill in the hands of a third person who gave value for it, or if any of the parties to the bill antecedent to such third person gave value for it, even though the holder knew that the acceptor received no consideration for it; for the object of an accommodation bill is to enable the party accommodated to obtain money on credit from a third person, and, therefore, the want of consideration furnishes no defence to one

Acceptor  
is the principal  
debtor.

<sup>a</sup> Wynne v. Raikes, 5 East, 414, *ante*, 421.

<sup>b</sup> Jackson v. Pigott, Lord Raym. 364. Salk. 127.

<sup>c</sup> See *ante*, 352, et seq.

<sup>d</sup> Dupays v. Shepherd, Holt, 297. Chitty, 310.

<sup>e</sup> Jackson v. Hudson, 2 Campb. 447.

<sup>f</sup> Per Best, C. J., in Philpot v. Briant, 4 Bing. 720. (15 Eng. C. L. 127.) Fentum v. Pocock, 5 Taunt. 192. (1 Eng. C. L. 72.)

<sup>g</sup> Pownal v. Ferrand, 6 B. & C. 439. (13 Eng. C. L. 230.)

<sup>h</sup> Darnell v. Williams, 2 Stark. 166. (3 Eng. C. L. 296.) Chitty, 334. Thompson v. Clubley, 1 M. & W. 212.



who has furnished money on the credit of the acceptor, though he may have been defrauded by the drawer.<sup>a</sup>

- \*428** **When acceptor will not be liable to the holder.** \*There are certain circumstances, however, under which the acceptor will not be liable to the holder of a bill, even for a consideration. Thus where *A.* accepted a bill for the accommodation of *B.*, after which *B.* absconded, and a creditor pursued him and obtained the bill from him, in ignorance of the circumstances under which it was accepted; it was held that he could not recover the amount from *A.*; for it would be unjust to compel *A.* to pay under the circumstances.<sup>b</sup> So where *A.* accepted a bill for the accommodation of *B.*, who delivered it to *C.*, his creditor, who after the acceptance became due returned the bill as *useless*; held, that *C.* could not, by subsequently obtaining possession of the bill, acquire a right of action against *A.*, unless it appeared that *A.* still intended to continue his accommodation.<sup>c</sup> Where the plaintiff took an indorsement of a promissory note payable on demand from the payee, with notice that the payee was indebted to the maker in a greater amount than that in the note, on separate transactions, it was held, that he could not recover from the acceptor more than the amount of some advances which he had made on the security of the note, before he had notice. "For," said Coleridge, J., "the intended effect of the notice was that, as between the payee and the maker, the note was no longer available; that what was tantamount to payment had taken place; and, therefore, that any further advance upon the note must be on the credit of the payee only, and it was reasonable that the notice should have the effect intended. It was not like an accommodation bill, the circulation of which the acceptor could have no right to prevent by giving notice, because such notice would be in direct contravention of his original undertaking; but it might be considered as a note made for a valuable consideration, and satisfied before the second holder had given any consideration for the indorsement. It was, therefore, no more in contravention of its original purpose to restrain its circulation by notice, than it would have been if, after payment, it had remained by accident \*or fraud in the hands of the original payee and he were contemplating to reissue it. The same principle which, in case of overdue bills without actual notice, limits the liability of the acceptor, to the extent of the knowledge which the law presumes, must in case of actual notice, whether the bill be overdue or not, limit the liability to the extent of the actual notice. As the acceptor had a right to give such notice, the indorsee must be taken to have made every advance subsequent to the notice on the credit of the in-
- \*429** **When the liability of the acceptor may be limited by notice.**

<sup>a</sup> Per Lord Eldon, in *Smith v. Knox*, 3 Esp. 46. Per Eyre, C. J., in *Collins v. Martin*, 1 B. & P. 651. *Fentum v. Pocock*, 5 Taunt. 192. (1 Eng. C. L. 79.)

<sup>b</sup> *Smith v. De Witts*, 6 D. & R. 120. (16 Eng. C. L. 256.) See *Martin v. Morgan*, 3 Moore, 635. (5 Eng. C. L. 87.)

<sup>c</sup> *Cartwright v. Williams*, 2 Stark. 340. (3 Eng. C. L. 374.)

dorser, and the acceptor was therefore not liable for such subsequent advances.”<sup>a</sup>

If a bill or note be *accepted* or *made* for a special purpose, no third person aware of that object can, by obtaining the instrument, apply it to a different purpose; if he does, the acceptor will not be liable.<sup>b</sup>

By acceptance the drawee admits the handwriting of the drawer, and he cannot afterwards be permitted to show that the drawer's signature was forged.<sup>c</sup> But acceptance is no admission of the handwriting of the indorser.<sup>d</sup>

An acceptance once completed and issued, cannot be re-  
voked.<sup>e</sup> But if the drawee writes an acceptance, he may afterwards cancel it whilst the bill remains in his possession, and before he delivers it out;<sup>f</sup> though it was formerly held otherwise.<sup>g</sup>

Accept-  
ance can-  
not be re-  
voked.

9.—*How an acceptor may be discharged.*] The acceptor's liability may be discharged by waiver, or release, or neglect of the holder to get paid.

A waiver may be either express or implied: express, as where the holder sent a message to the acceptor of an accommodation bill that the business had been settled with the drawer, and that *he need not give himself any further trouble*; \*held, a waiver of the acceptance.<sup>h</sup> So where the holder agreed to consider the acceptance at an end.<sup>i</sup> So where in an action by joint indorsees against the acceptor of an accommodation bill, it appeared that the plaintiffs had said, at a meeting of the defendant's creditors, that “they looked to the drawer, and should not come upon the acceptor.” They had, at that time, goods of the drawer in their hands, which afterwards turned out to be of no value. Lord Ellenborough directed the jury to consider whether the plaintiffs' language amounted to an absolute, unconditional renunciation of all claim upon the acceptors, whereby the latter had entered into the arrangement with their creditors; in that case the acceptors were discharged from liability; but if, on the other hand, the words only imported a conditional promise not to resort to the acceptors if satisfied elsewhere; they did not by such promise waive their remedy, and the acceptor continued liable until the bill was paid.—The jury found for the plaintiffs.<sup>j</sup> The can-

\*430,

<sup>a</sup> *Goddall v. Ray*, 1 H. & W. 333. 4 Dowl. 76, in the Bail Court.

<sup>b</sup> *Chitty*, 91. *Evans v. Kymer*, 1 B. & Ad. 529. (20 Eng. C. L. 437.) *Kay v. Flint*, 8 Taunt. 21. (4 Eng. C. L. 3.) *Buchanan v. Findlay*, 9 B. & C. 738. (17 Eng. C. L. 486.)

<sup>c</sup> *Price v. Neal*, 3 Burr. 1354.

<sup>d</sup> *Smith v. Chester*, 1 T. R. 655.

<sup>e</sup> *Bayley*, 204.

<sup>f</sup> *Cox v. Troy*, 5 B. & A. 474. (7 Eng. C. L. 163.)

<sup>g</sup> *Thornton v. Dick*, 4 Esp. 270. *Trimmer v. Oddie*, cited in 6 East, 200; and see *Bentinck v. Dorrien*, 6 East, 199.

<sup>h</sup> *Black v. Peele*, cited Doug. 236-7.

<sup>i</sup> *Walpole v. Pultney*, *id.*

<sup>j</sup> *Whatley v. Tricker*, 1 Camp. 35.

cancellation of the acceptor's name by the holder, is a waiver of the acceptance, and where a third person cancels, it is a question for the jury whether that cancellation was with the consent of the holder.<sup>a</sup> But a declaration by the holder that he should look to the drawer for payment, and that he wanted no more from the acceptor than another debt not connected with the bill, has been held not a sufficient discharge, as the holder did not expressly renounce all claim upon the acceptance.<sup>b</sup>

An acceptor of a bill is not discharged by the bill not being presented for payment for three or four years after it becomes due; "nothing will discharge an acceptor but payment, express agreement, express renunciation, or neglect to get paid when the means were in the holder's own power."<sup>c</sup> Telling an accommodation acceptor that he shall not be troubled about the bill, will not discharge him, though the holder knew that he  
 \*431 \*was an accommodation acceptor; but it might be otherwise if the plaintiff had given time to the drawer.<sup>d</sup> If the holder of a bill agrees not to sue the acceptor upon his making an affidavit that the acceptance was a forgery, he will be precluded from suing him if such affidavit be made and sworn, though it be false.<sup>e</sup>

It has been held that an accommodation acceptor was discharged by the holder giving time to the drawer with knowledge that it was an accommodation bill.<sup>f</sup> But that decision has been overruled.<sup>g</sup> A material alteration effected in the bill without the consent of the acceptor will discharge him.<sup>h</sup>

Who may  
accept a  
bill *supra*  
*protest*.

10.—*Acceptance supra protest.*] When a bill is protested for non-acceptance or for better security, *any person* may accept it, *supra protest*, for the honor of the drawer or of any of the indorsers. The drawee himself, though he refuses to accept the bill generally, may accept it for the honor of the drawer or an indorser. And if the drawee has accepted and absconded, or become bankrupt, any other person may accept for the honor of the drawer or of an indorser.<sup>i</sup> Though after a general acceptance by the drawee another person cannot make a second acceptance,<sup>j</sup> yet, when a bill has been accepted *supra protest*, for the honor of one party, it may by another person be accepted *supra protest*, for the honor of another party.<sup>k</sup> The method of accepting *supra protest* is as follows:

<sup>a</sup> Sweeting v. Halse, 9 B. & C. 365. (17 Eng. C. L. 394.)

<sup>b</sup> Parker v. Leigh, 2 Stark. 228. (3 Eng. C. L. 327.)

<sup>c</sup> Per Littledale, J., in Farquhar v. Southey, M. & M. 14; (22 Eng. C. L. 234;) and see Dingwall v. Dunster, Doug. 235.

<sup>d</sup> Adam v. Gregg, 2 Stark. 531. (3 Eng. C. L. 461.)

<sup>e</sup> Stevens v. Thacker, Peake, 187.

<sup>f</sup> Laxton v. Peate, 2 Camp. 185.

<sup>g</sup> Fentum v. Pocock, 5 Taunt. 192. (1 Eng. C. L. 72.)

<sup>h</sup> Long v. Moore, 3 Esp. 155. Tidmarsh v. Grover, 1 M. & S. 735, *ante*, 389.

<sup>i</sup> Bayley, 177.

<sup>j</sup> Jackson v. Hudson, 2 Camp. 447, *ante*, 427.

<sup>k</sup> Beawes, Pl. 42.

the acceptor must personally appear before a notary public with witnesses, and declare in whose honor he accepts the bill; then he must subscribe the bill thus, "Accepted *supra protest* in honor of *A. B.*," or, as is more usual, "accepts *s. p.*" A general acceptance *supra protest*, which does not express for whose name it is made, is considered as made for the honor of the drawer.<sup>a</sup>

\*A person who accepts for honor, or *supra protest*, is only liable if the original drawee do not pay; in order, therefore, to render such an acceptor liable, the bill must be presented for payment to the original drawee when due, and protested for non-payment; because between the time of the first refusal of the drawee to accept the bill, and the time when it becomes payable, effects might have reached his hands out of which he may pay the bill if presented again.<sup>b(1)</sup>

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Liability of acceptor or *supra protest*.

A second protest for non-payment by the drawee is necessary in order to enable the acceptor *supra protest*, or the *holder*, to recover against the party for whose honor the bill has been accepted. Whatever is requisite to enable a person who has accepted a bill for the honor of another to call upon that person to repay him, and to enable him to recover over against such person, may be also reasonably held necessary to enable another party to recover against such acceptance for honor; for if you could recover against an acceptor for honor by proof of less than will enable him to recover against the party for whom he accepts, there would be an inconsistency, for it might be said with reason, that if the acceptor for honor chooses to pay without requiring all the proof from the holder which would be necessary for him to recover against the drawer, the payment would be made in his own wrong, and he would not be entitled to recover over.<sup>c</sup>

Where a bill of exchange, payable after sight, having been protested for non-acceptance, was accepted by a third person for the honor of the drawer *eight days afterwards*, and when at maturity, *according to that acceptance*, was presented for payment to the drawee and the acceptor for honor; held, in actions against the latter and the drawer, that these presentments \*for payment were made at a proper time, and that neither of the parties was discharged, by presentment not having been made to the drawee at the time the bill would have

Presentment to the drawee. \*433

<sup>a</sup> Chitty, 377.

<sup>b</sup> Hoare v. Cozenove, 16 East, 391. The result, as it seems to me, of the decision in Hoare v. Cozenove is, that an acceptance for honor is to be considered not as *absolutely* such, but in the nature of a conditional acceptance. It is equivalent to saying to the holder of the bill, "Keep this bill, do not return it, and when the time arrives at which it ought to be paid, if it be not paid by the party on whom it was originally drawn, come to me and you shall have the money." Per Lord Tenterden, C. J., in Williams v. Germaine, 7 B. & C. 477. (14 Eng. C. L. 88.)

<sup>c</sup> *Id.*

(1) (Schofield v. Bayard, 3 Wend. 488.)

come due, calculating from the exhibition of it to the drawee.<sup>a</sup> Presentment to the drawer for payment and a protest must be averred in the declaration, otherwise judgment may be arrested.<sup>b</sup> Presentment to acceptors for honor may now be made on the day after the bill becomes due, and if that day be on Sunday, then on the Monday.<sup>c</sup>

Where a foreign bill of exchange was drawn by *A.* on *C.* and Co., who resided at Liverpool, in favor of *R.* and Co., and by *A.* indorsed to the plaintiffs. The bill was drawn "sixty days after sight, pay *R.* and Co., in London." It was refused acceptance by the drawees, but accepted *supra protest* by the defendants, as follows: "accepted *supra protest* for the honor of *R.* and Co., and will be paid for their account, *if regularly protested and refused when due.*" This bill was presented for payment at the drawee's at Liverpool, and protested there for nonpayment, but not presented in London, the drawees having no house of business there; held, that this was sufficient to render the acceptors *supra protest* liable, and that a presentment in London was not necessary. The peculiar form of the acceptance in this case rendered it necessary that the bill should be presented to the drawees; and excluded the question of usage.<sup>d</sup> It appeared from the evidence in this case, that according to the usage in London, if the holder of the bill resided in London, he was not bound to send the bill to Liverpool to get it protested. "The more regular way," said Littledale, J., "is to apply personally to the drawee himself if he has any residence where the bill can be presented."<sup>e</sup>

\*434 If an acceptor *supra protest* pay, he is entitled to have recourse for repayment to the person for whose honor he made the \*acceptance, and to all other parties who are liable to that person,<sup>f</sup> and where the bill has been protested for better security, the acceptor *supra protest* may sue the acceptor for any damages which he has thereby incurred.<sup>g</sup> An acceptor for the honor of an indorser has a right to sue such indorser and all the antecedent parties; but he has no claim against subsequent indorsers.<sup>h</sup>

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<sup>a</sup> Per Lord Tenterden, C. J., in *Williams v. Germaine*, 7 B. & C. 477. (14 Eng. C. L. 87.)

<sup>b</sup> *Id.*

<sup>c</sup> 6 & 7 Will. IV, c. 58.

<sup>d</sup> *Mitchell v. Baring*, 10 B. & C. 4. (21 Eng. C. L. 12.) 4 C. & P. 35. (19 Eng. C. L. 261.)

<sup>e</sup> *Id.* 10. (21 Eng. C. L. 15.) By the 2 & 3 W. IV, c. 98, it is enacted, that all bills made payable by the drawer in any place other than the residence of the drawee, may on non-acceptance be protested, without further presentment to the drawee, for non-payment in the place where they are made payable.

<sup>f</sup> Bayley, 179.

<sup>g</sup> *Ex parte Wackerbath*, 5 Ves. 574.

<sup>h</sup> Chitty, 383.

SECTION IX.

PRESENTMENT FOR PAYMENT.

1. When to be made.	PAGE	3. At what place . . .	PAGE
2. At what hour. . .	439		440

1.—*When presentment for payment should be made.*] THE Present- holder of a bill of exchange or promissory note should present it to the acceptor or maker for payment when due, or if no time should be made of payment be specified, (as if it be payable on demand,) with- when the in a reasonable time, after the receipt of the instrument, and if bill be- the bill or note be not honored, he should give notice thereof, comes due without delay, to the other parties to the instrument; otherwise Notice of they will be discharged from all liability on such instrument;\* nonpay- and the bankruptcy or insolvency of the acceptor or maker, ment. however notorious it may be, will not excuse a default in the holder to make due presentment, and give notice of the dishonor.<sup>b</sup>(1)

Want of effects in the hands of the acceptor, excuses the in- dorsee of an accommodation bill from presenting it for payment, as well as from giving notice of dishonor to the drawer.<sup>c</sup>

The time, when a presentment for payment must be made, depends upon the time when a bill or note is payable. \*435

A bill or note payable on demand and checks must be pre- Present- sented within *a reasonable time*, which is a question of law for ment of a \*the determination of the court.<sup>d</sup>(2) With respect to a bill or bill pay- note payable on demand, or at sight, and given for cash by a able on de- person who makes the profit by the money, on such bills or mand should be notes, a source of livelihood, it is difficult to say what length of made

<sup>a</sup> Heylyn v. Adamson, 2 Burr. 669. Presentment should be made by the holder of the bill or note, or an agent competent to give a legal receipt for the money. Per Lord Kenyon, C. J., in Coore v. Callaway, 1 Esp. 115.

<sup>b</sup> Camidge v. Allenby, 6 B. & C. 373. (13 Eng. C. L. 201.) Howes v. Bowe, 16 East, 112. 1 M. & S. 555. Judgment of the King's Bench reversed in Error, 5 Taunt. 30. (1 Eng. C. L. 8.) Esdaile v. Sowerby, 11 East, 114. Russell v. Langstaffe, Doug. 497, *arguendo*.

<sup>c</sup> Terry v. Parker, 1 N. & Per. 752. In this case Lord Denman said, that De Berdt v. Atkinson, 2 H. Bl. 336, could not be sustained.

<sup>d</sup> Derbyshire v. Parker, 6 East, 3. Parker v. Gordon, 7 East, 385. Haynes v. Birks, 3 B. & P. 599. Appleton v. Sweetapple, Bayley, 239. Whether it is a question of fact or of law has never been expressly decided. In Derbyshire v. Parker, Lawrence, J., intimated a decided opinion that it was a question of law for the judges, and yet, in many instances since, it has been treated as a question of fact for the jury. Bayley, 236. Fry v. Hill, 7 Taunton, 397. (2 Eng. C. L. 152.) Goupy v. Harden, *id.* 159. (2 Eng. C. L. 58.)

(1) (Groton v. Dallheim, 6 Greenleaf, 476. Shaw v. Reed, 12 Pick. 132.)  
(2) (Sylvester v. Crapo, 15 Pick. 92. Taylor v. Young, 3 Watts, 339. Mohawk Bank v. Broderick, 10 Wend. 304. Gough v. Staats, 13 Wend. 549. Cromwell v. Lovett, 1 Hall, 56. Lovett v. Cornwell, 6 Wend. 369. Merchants' Bank v. Spicer, 6 Wend. 443.)



- within a time such person shall be entitled to consider unreasonable; but when such bills or notes are given by way of payment or paid into the banker's, any time "beyond what the common course of business warrants" is unreasonable.<sup>a</sup> The course of business with respect to a bill given in payment, seemed formerly to allow the party to keep it, if payable in the place where it was given, until the morning of the next day of business after its receipt, and until the next post, if payable elsewhere, but no longer.<sup>b</sup>

What is a reasonable time. But in a more recent case, where a note payable in London was received in the country, and not sent by the post until the following day, though it might have been sent the day on which it was received, and the person receiving it in London, did not present it for payment until the day after he had received it; the court held, that it was presented within a reasonable time.<sup>c</sup> Where a servant at one o'clock on Friday afternoon, received of the defendant at Devonport, country bank notes payable there in payment for cattle sold there, but he did not deliver the notes to his master (who resided 14 miles from Devonport, and who was absent from home the whole of Friday) until Saturday evening; the notes were presented for payment on Monday, but the bank stopped on the previous Saturday. Held, that the master was not guilty of laches in not presenting the notes on Saturday. *Per curiam*, a party receiving a bank note if payable \*in the place where it is given, is not bound to present it until the morning of the next day of business after its receipt, and if payable elsewhere, he is bound to send it by the post of the following day. The plaintiff was not bound to send these before the Saturday's post, in which case they could not have been presented as the bank had stopped.<sup>d</sup>

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It has been established by several decisions, that a person receiving a check or a bill or note payable elsewhere on demand or at sight, will not be deemed guilty of negligence by not sending by post or otherwise to the place of payment until the following day, and that the person to whom he has sent such an instrument need not present it for payment until the day after he has received it; and if such an instrument be received where it is payable, it need not be presented until the following day.<sup>e</sup>

If the holder does not But if the holder does not forward such bill, note, or check for payment the following day, he will be deemed guilty of laches. Where the defendant delivered to the plaintiff "at

<sup>a</sup> Ward v. Evans, Lord Raym. 928. Moor v. Warren, Stra. 415. Turner v. Mead, id. 416. Hoar v. De Costa, id. 910. Bayley, 236.

<sup>b</sup> East India Company v. Chitty, Stra. 1175. Appleton v. Sweetapple, Bayley, 239.

<sup>c</sup> Williams v. Smith, 2 B. & A. 496.

<sup>d</sup> James v. Houlditch. 8 D. & R. 40. (16 Eng. C. L. 332.)

<sup>e</sup> Williams v. Smith, 2 B. & A. 496, ante, 435. Rickford v. Ridge, 2 Campb. 537, Robson v. Bennett, 2 Taunt. 388. Pocklington v. Sylvester, Chitty, 419.

Tunbridge" a check on the Maidstone bank, on the 5th, before the post went out, and the plaintiff sent it on the morning of the 7th, by a carrier, who arrived at Maidstone at nine o'clock, but the bank did not open on that day at all; had it been sent by the post on the 6th, it would have arrived at eight o'clock, which would be an hour earlier; held, that the plaintiff was guilty of laches, which precluded him from recovering the value which he had given for the check. "I will not say," observed Gibbs, C. J., "that it was his duty to have sent the check by the post of the 5th, but the extreme time to which he was justified in keeping it was up to the post of the 6th. He did not send it till the 7th. It does not matter when the carrier arrived, the plaintiff must suffer for his negligence.<sup>a</sup>

forward the bill on the day after he receives it, he will be guilty of laches.

So where the defendant gave the plaintiff country bank notes in payment for oats at three o'clock, P.M., on the 10th, at a distance of forty miles from the place where they were payable. At eleven o'clock on that day the bank stopped payment, but \*neither the plaintiff nor the defendant knew it. The plaintiff kept them until the 17th, when he required defendant to take them back, and upon his refusing, the plaintiff sued him for the price of the oats; held, that he was not entitled to recover, for by not presenting the notes for payment, or putting them in circulation, he made them his own, and the debt was to be considered as discharged. If the plaintiff had given prompt notice, the defendant might have resorted to the parties from whom he had the notes, or he might sue the bankers.<sup>b</sup>

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Where the payee of a *crossed check* paid it on the day it was drawn into his banker's in London, about seven minutes before four o'clock. By the usage of the city of London, crossed checks presented at the clearing house in due time are paid on the same day; and bankers present such checks, if they receive them in time and obtain payment on that day. If the check in question had been presented before four o'clock, it would have been paid; but the bankers neglected to do so, and it was dishonored on the following day. In an action on the check by the payee against the drawer; held, that, assuming that the negligence of the banker might render him liable to the payee, it did not discharge the drawer; for the payee, (the holder,) was not bound to present it till the close of the banking hours on the following day; therefore he was not guilty of laches. The custom prevailed only as between the banker and his customer, not as between debtor and creditor; the drawer therefore was liable on the check.<sup>c</sup>

Presenting crossed checks.

If a bill be payable at either of two places, the holder has the option at which place to present it, and it will not be deemed Bill payable at two places.

<sup>a</sup> Beckling v. Gower, Chitty, 416.

<sup>b</sup> Camidge v. Allenby, 6 B. & C. 373. (13 Eng. C. L. 201.)

<sup>c</sup> Boddington v. Schlenker, 4 B. & Ad. 752. (24 Eng. C. L. 153.)

laches in him if he presented it at the most distant, though if he presented it at the other it would have been paid.<sup>a</sup>

Days of  
grace.

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A bill or note payable at a certain time after date, or after sight, or after a certain event, or on a given future day, or at usance, ought not to be presented for payment until three days after the expiration of that time. These three days are called days of grace.<sup>(1)</sup> They are reckoned exclusive of the day on which the bill falls due, and inclusive of the last day of grace.<sup>(2)</sup> The number of these days varies in different countries; in some places they amount to fifteen, but in Great Britain and Ireland they are only three.

Days of grace are allowed on promissory notes<sup>b</sup> as well as on bills. They are not allowed on bills or notes payable on demand. It has never yet been expressly decided whether days of grace are allowed on bills payable at sight, but the weight of authority is in favor of such an allowance.<sup>c</sup>

Mode of  
calculating the  
time when  
a bill be-  
comes due

It may here be observed that the calculation of time depends upon the various modes of computing time. If a bill be payable so many months after date, it is to be computed by calendar not lunar months, as if a bill be drawn on the 31st of January, payable one month after date, it will be due on the 28th of February, and with the days of grace, payable on the 3d of March; or if dated the 1st of January, it will be due on the 1st of February, and be payable on the 4th. Where a bill is payable so many days after date, or after sight, the one day is inclusive and the other exclusive. Thus a bill payable twenty days after date, and dated the 1st of January, is not due until the 21st; and a bill payable ten days after sight, which is equivalent to "after acceptance," or "after protest for non-acceptance,"<sup>d</sup> if accepted or refused on the 1st, is due on the 11th.

Payable at  
usance.

Where a bill is payable at *usance*, (which implies the time that is usually appointed for the payment of bills between different countries,) double or treble usance is double or treble the usual time; and half usance is half that time. The *usance* between this country and any place in France, Amsterdam, Rotterdam, Hamburg, or Altona, is one calendar month; the *usance* between us and Cadiz, Madrid, or Bilboa, two; and

<sup>a</sup> Beeching v. Gower, Holt, 313. (3 Eng. C. L. 117.)

<sup>b</sup> Brown v. Harraden, 4 T. R. 148.

<sup>c</sup> Chitty, 410, S. N. P. 352.

<sup>d</sup> Campbell v. French, 6 T. R. 212. Sturdy v. Henderson, 4 B. & A. 592. (6 Eng. C. L. 530.) If a bill be accepted *supra protest*, the time is to be calculated from the date of such acceptance. Williams v. Germaine, 7 B. & C. 468, (14 Eng. C. L. 84,) *ante* 433.

(1) (The days of grace on negotiable notes, constitute a part of the original contract; and the negotiability of the note is as unrestricted, during those days, as before their commencement. *Savings Bank v. Bates*, 8 Conn. 505. No days of grace are due on a note not negotiable. *Backus v. Danforth*, 10 Conn. 297.)

(2) (Demand should be made on the last day of grace. *Farmers' Bank v. Duvall*, 7 Gill & Johns. 78. *Bank of Alexandria v. Swann*, 9 Peters. 33. If that should be Sunday, the demand may be made on the preceding day. *Ontario Bank v. Petrie*, 3 Wend. 456.)

the *usance* between us and Leghorn, Genoa, or Venice, three. When it is necessary to divide a month, upon half a *usance*, the division \*contains fifteen days.<sup>a</sup> Usances are calculated exclusively of the date of the bill.<sup>b</sup> \*439

All countries with which we are in the habit of negotiating Old and bills compute their time by the new style, with the exception of new style. Russia, which adheres to the old style. When a bill is drawn at a place using one style, and payable at a place using the other, if the time is to be reckoned from the date, it shall be computed according to the style of the place where it is drawn otherwise according to the style of the place where it is payable; and in the former case the date is to be reduced or carried forward to the style of the place where the bill is payable, and the time reckoned from thence.<sup>c</sup>

When a bill falls due on a Sunday, Christmas-day, Good-Friday, public fast, or thanksgiving day, it becomes payable on the preceding day, and if not then paid may be treated as dishonored.<sup>d</sup>

2.—*At what hour presentment should be made.*] Presentment for payment should be made within the usual hours of business. If by the known custom of any place, bills and notes be only payable within limited hours, a presentment *there* out of these hours is unseasonable.<sup>e</sup> If an acceptance be payable at a banker's, the bill should be presented during banking-hours.<sup>f</sup> But if the banker appoints a person to attend at the bank to give an answer, a presentment at *any time* while that person is in attendance is sufficient.<sup>g</sup> Presentment should be made within the usual hours of business.

But though in the latter case a presentment out of banking-hours has been held sufficient for the purpose of supporting a protest to charge the drawer; it would not be sufficient to charge the bank with a breach of duty for non-payment. In an action on the case against the Bank of England for not paying a bill accepted by the plaintiff, though they had sufficient funds in their hands for that purpose; it appeared that the bill was presented in the morning, when there were no effects. In a subsequent part of the day, a sum was paid in sufficient to meet the bill; at six o'clock the bill was again presented, when a person in attendance, answered that there were no effects. The \*banking-hours were from nine to five, but it was the custom to have a person in attendance after banking-hours to give an answer to any presentments, which it was expected \*440

<sup>a</sup> Bayley, 250.

<sup>b</sup> *Id.*

<sup>c</sup> Bayley, 249.

<sup>d</sup> Tassell v. Lewis, 1 Ld. Raym. 743. 39 & 40 Geo. III, c. 42. 7 & 8 Geo. IV, c. 15.

<sup>e</sup> Bayley, 224.

<sup>f</sup> Parker v. Gordon, 7 East, 385. Elford v. Teed, 1 M. & S. 28. Jameson, 2 Taunton, 224.

<sup>g</sup> Garnett v. Woodcock, 1 Stark. 476. (2 Eng. C. L. 473.) 6 M. & S. 44, yet see Elford v. Teed, *supra*.

a notary would make, on account of the previous dishonor in the course of the day; held, that the action was not sustainable. Lord Abinger observed, "that it never had been considered that the bank were bound to pay after their accustomed hours; there was no specific contract to do so, nor was there any ground to infer a contract for that purpose. It would be of no convenience to trade if such a practice were to prevail. The contract between the parties was that the bank should pay all bills presented within the hours of business."<sup>a</sup>

If the party who is to pay the bill or note be not a banker, a presentment at his place of residence or business at any hour, except during the hours of rest, will, it seems, be sufficient, even though there be no person there to give an answer. Where a bill was presented at half-past seven o'clock in the evening, at a dwelling-house in London, where it was made payable, Lord Tenterden, C. J., said, that it was an established rule of trade, that a presentment at a banker's out of the hours of business was not sufficient; but in other cases the rule of law was that the bill must be presented within a reasonable time. A presentment at twelve o'clock at night when a person has retired to rest would be unreasonable; but he could not say that a presentment between seven and eight in the evening was not a reasonable time.<sup>b</sup>

\*441 3.—*At what place presentment should be made.*] A bill or note should be presented at the place where it is made payable in all cases; that will be sufficient, even though there be no person there.<sup>c</sup>(1) But if a bill be accepted *generally*, that is, where the \*acceptance is not qualified pursuant to the provisions of 1 & 2 Geo. IV, c. 78, by adding the words "only, and not otherwise or elsewhere;"<sup>d</sup> in order to charge the acceptor, it is not necessary to present it at the place where it is made

If the acceptance be general, presentment need not be made at any place, in order to

<sup>a</sup> Whittaker v. The Bank of England, 1 Gale, 54. 1 C. M. & R. 744. 5 Tyr. 268.

<sup>b</sup> Wilkins v. Jadis, 2 B. & Ad. 188. (22 Eng. C. L. 57.) Barclay v. Bailey, 2 Camp. 527. Morgan v. Davison, 1 Stark. 114. (2 Eng. C. L. 319.)

<sup>c</sup> Saunderson v. Judge, 2 H. Bl. 509. Giles v. Bourne, 2 Ch. R. 200. De Bergareche v. Pillin, 3 Bing. 476. (13 Eng. C. L. 59.) Mackintosh v. Haydon, R. & M. 362. (21 Eng. C. L. 456.) Hawkey v. Borwick, 4 Bing. 135. (13 Eng. C. L. 376.) An averment that a bill was presented to the acceptor will be satisfied by proof that it was presented at the place where it was made payable, though there be no person in attendance to give an answer. Hine v. Allely, 4 B. & Ad. 624. (24 Eng. C. L. 127.) And see Hawkey v. Borwick, *supra*.

<sup>d</sup> See *ante*, 425.

(1) (Where a note was payable "at either of the Banks" of Boston, it was held that it was incumbent upon the holder to give notice to the maker where it was to be found. *The North Bank v. Abbott*, 13 Pick. 465. It is sufficient evidence of demand of payment, and of refusal to pay a note payable at a particular place, if the note be left there, and no funds are provided to take it up. *Nichols v. Goldsmith*, 7 Wend. 160. *Rahm v. The Philadelphia Bank*, 1 Rawle, 335. It has been held, in this country, that on a note payable at a certain time and place, no demand is necessary to charge the maker or acceptor. *Conn v. Gano*, 1 Ohio, 223. *Payson v. Whitcomb*, 15 Pick. 212. *Wolcott v. Van Santvoord*, 17 Johns. 248. See 3 Kent Com. 66.)



payable.<sup>a</sup> As where the holder of a bill made payable at a charge the banker's, but not made payable "there only," did not present acceptor. it for payment; and the bankers, three weeks afterwards, failed, having had in their hands during all that time a balance in favor of the acceptor, exceeding the amount of the bill; it was held, that the latter was not discharged by the omission to present the bill for payment, it being in law a general acceptance, in which case, the holder is not bound to present the bill at any particular time or place;<sup>b</sup> and even if a bill be made payable at a particular place by the drawer, and *accepted generally* without adding the words, "and not elsewhere," it is not necessary to present it at such place in order to render the acceptor liable; for there is no distinction made in the act between the case where the bill is rendered payable by the language of the drawer, and the case where it is rendered so payable by the language of the acceptor.<sup>c</sup> But in such a case, Presentment to charge the drawer. presentment at the place specified in the bill is necessary in order to charge the *drawer*. As where a bill was drawn in Liverpool, on persons residing there, and in the body of it made payable *in London*, and accepted by the drawees payable in London; when due it was presented to the drawees in Liverpool, who refused payment; held, by the Court of Exchequer Chamber, on a bill of exceptions to the direction of the judge in an action against the drawer, that the drawer was not liable under the circumstances as the bill was not presented in London. Tyndal, C. J.: "Where a bill is *drawn* payable at a particular place, and the drawee accepts it payable at that place; in an action against the *drawer*, presentment to the acceptor at that place must be proved, and consequently must be alleged; nor will the fact that the special acceptance, payable at the banker's, (but not complying with the 1 & 2 Geo. IV, c. 78,) was made before the bill passed out of the hands of the drawer, dispense with the necessity of such proof or vary his liability."<sup>d</sup>

Promissory notes are not within the 1 & 2 Geo. IV, c. 78. When a note must be presented at a particular place, in order to charge the maker. If a note be made payable at a particular house, and such house be mentioned in the body of the note, a presentment there is necessary to charge the maker.<sup>e</sup> But if the place of payment be not incorporated in the note, but mentioned in the margin or at the foot of the note only, by way of memorandum, it does not constitute any part of the contract; therefore, it is not necessary to present it at such place, to render the maker liable, nor, in an action against him, to aver such present-

<sup>a</sup> Rhodes v. Gent, 5 B. & A. 244. (7 Eng. C. L. 84.) Sebag v. Abithol, 4 M. & S. 462.

<sup>b</sup> Turner v. Hayden, 4 B. & C. 1. (10 Eng. C. L. 259.)

<sup>c</sup> Selby v. Eden, 3 Bing. 611. (13 Eng. C. L. 70.) 11 Moore, 511. Fayle v. Bird, 6 B. & C. 531. (13 Eng. C. L. 246.)

<sup>d</sup> Gibbs v. Mather, 8 Bing. 214. (21 Eng. C. L. 277.) 2 C. & J. 254.

<sup>e</sup> Sanderson v. Bowes, 14 East, 500. Dickenson v. Bowes, 16 East, 110-112. Bowes v. Howe, 5 Taunton, 30. (1 Eng. C. L. 8.)



ment in the declaration.<sup>a</sup> An averment in a declaration, in an action by an indorsee against the maker, that the note was payable at the *house of B. & Co.*, where the address was only a memorandum at the foot of the note, was held to be a fatal variance; because the plaintiff averred the address to be part of the contract, whereas it was only a memorandum; it was, therefore, a misdescription of the instrument.<sup>b</sup> It was held, however, in one case, that where a note was printed with blanks for the sum, the names of the parties, and the dates, and the place where it was made payable was also printed by way of a memorandum, presentment should be made at that place, because the stipulation being printed, must have been on the note at the time the note was made, and was to be considered part of the note.<sup>c</sup>

Consequences of not duly presenting

The consequence of not duly presenting a bill or note is, that all the antecedent parties are discharged from their liability, whether on the instrument or on the consideration for which it was given. The acceptor or maker, however, still continues liable, except where a bill is made payable at a particular place \*in the express terms of 1 & 2 Geo. IV, c. 78, in which case the acceptor would be discharged if he sustained any loss for want of such presentment.<sup>d</sup> But a *delay* in making presentment there, will not operate as a discharge of the acceptor, unless the money be lost in consequence of such delay, as by the banker in the mean time failing.<sup>e</sup>(1)

<sup>a</sup> Williams v. Waring, 10 B. & C. 2. (21 Eng. C. L. 11.) Price v. Mitchell, 4 Campb. 200. Callahan v. Aylett, 2 Campb. 551. Wild v. Rennards, 1 Campb. 425.

<sup>b</sup> Exon v. Russell, 4 M. & S. 505.

<sup>c</sup> Trecothick v. Edwin, 1 Stark. 468. (2 Eng. C. L. 470.) But this distinction was overruled in Williams v. Waring, *supra*.

<sup>d</sup> Chitty, 397.

<sup>e</sup> Rhodes v. Gent, 5 B. & A. 244. (7 Eng. C. L. 84.)

(1) (In making a demand of payment it is necessary that the note should be present ready to be delivered up on payment, or if lost or destroyed that an indemnity should be tendered. Ambrose v. Hapwood, 2 Taunt. 61. Callaghan v. Aylett, 3 Taunt. 397. Bowes v. Howe, 5 Taunt. 30. Bank v. Jones, 6 Mass. 524. Freeman v. Boynton, 7 Mass. 483. Woodbridge v. Brigham, 13 Mass. 557. U. S. Bank v. Smith, 11 Wheat. 171. Eastman v. Potter, 4 Vermont, 313. Whitwell v. Johnson, 17 Mass. 449. Shaw v. Reed, 12 Pick. 132. Bank of Maryland v. Duvall, 7 Gill & Johns. 73. Stuckert v. Anderson, 3 Wharton, 116.)

SECTION X.

NOTICE OF DISHONOR.

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1.—*General rules respecting notice.*] As the requisites of the notice and consequences of omitting it in case of dishonor for non-acceptance, and for non-payment, are very similar, they shall be considered under the same head.(1)

It is a general rule, that the holder of a bill of exchange or promissory note, which is dishonored by non-acceptance or non-payment is bound to give due notice thereof to the drawer and indorsers of the bill, and to the indorsers of the promissory note, or the party to whom such notice has not been given will be discharged from all liability, not only on the instrument itself, but also on the consideration for which the bill was paid.\*

In case of non-acceptance, if the drawee after a partial or conditional acceptance, or an acceptance at an extended period, or if any other person offer an absolute one, though the holder may be willing to acquiesce in such acceptance, he must give notice.<sup>b</sup> And whenever an attempt is made to procure an \*acceptance, though the application for such acceptance might have been unnecessary, notice should be given, otherwise the party may lose his remedy on the bill. But if an innocent indorser for a valuable consideration takes such a bill after the refusal to accept, and without any knowledge of such refusal, he will not be precluded from recovering by the negligence of a previous holder.<sup>c</sup> A neglect to give notice, where there is a conditional acceptance, is done away by the completion of those conditions before the bill becomes payable; and a neglect where there is an acceptance as to part, and a refusal as to the residue, discharges the persons entitled to notice “as to the residue” only.<sup>d</sup> \*444

Where a bill has been refused acceptance, and due notice thereof given, it is unnecessary to give notice of the subsequent refusal to pay; because a right of action against the drawer and indorsers had previously been complete on their receiving notice of non-acceptance.<sup>e</sup>

\* Bridges v. Bury, 3 Taunt. 130. 3 M. & S. 362.  
b Bayley, 253.  
c O’Keefe v. Dunn, 6 Taunt. 305. (1 Eng C. L. 392.)  
d Bayley, 254. e Price v. Dardell, Chitty, 467.

(1) (Selwyn’s N. P. [Ed of 1831,] 299, n. L.)

Notice  
should in-  
form the  
party that  
the bill  
was dis-  
honored.

\*445

2.—*Form of notice.*] No precise form of words is necessary in giving notice of the dishonor of a bill or note; any act of the holder distinctly signifying to the party that the bill or note was dishonored will be sufficient.<sup>(1)</sup> But where the attorney of the holder wrote a letter to an indorser in the following terms, "A bill for 683*l.*, drawn, &c., and bearing your indorsement, has been put into our hands by Mr. *A.*, with directions to take legal measures for the recovery thereof unless immediately paid," the court of Exchequer Chamber held, that it was insufficient. Tyndal, C. J., in delivering the judgment of that court, said, "that notice of dishonor, which was substituted in this country for a protest, did not require all the precision and formality of a protest; but it should at least inform the party to whom it is addressed, either in express terms or by necessary implication, that the bill has been dishonored, and that the holder looks to him for payment of the amount; but looking at this notice, no such intimation is conveyed in terms, or is necessarily to be \*inferred from its contents."<sup>a</sup> So a letter from an indorsee to a drawer, merely containing a demand of payment, and threatening legal proceedings, without apprising him of the fact of dishonor, was held insufficient.<sup>b</sup> So a letter from the indorsee to the indorser in these words, "the promissory note, &c., (describing it,) indorsed by you, became due yesterday, and is returned to me unpaid; I therefore give you notice thereof, and request you will let me have the amount thereof forthwith," was, on the authority of the preceding cases, held insufficient.<sup>c</sup> But this decision may be considered as overruled by a subsequent case in the court of Exchequer, where it was held that a notice in the following form was by reasonable intendment sufficient: "I am desired to inform you that a promissory note, dated August 10, made by *T.*, payable to order in two months, became due yesterday, and has been returned unpaid; and I have to request you will remit the amount, with 1*s.* 6*d.* for noting."<sup>d</sup> Notice in the following form, "I give you notice that a bill, &c., *drawn by you*, &c., lies at, &c., dishonored," has been held insufficient to sustain an action against an indorser who was not the drawer, for it is a misdescription of the instrument, which might lead the indorser to confound it with some other.<sup>e</sup> If a foreign bill of ex-

<sup>a</sup> *Solarte v. Palmer*, 7 Bing. 530. (20 Eng. C. L. 226.) 2 Moore & P. 475. S. C. in Error. 1 Bing. N. C. 194. (27 Eng. C. L. 351.) 5 M. & Scott, 1. 2 Clarke & F. 93.

<sup>b</sup> *Hartley v. Case*, 4 B. & C. 339. (10 Eng. C. L. 350.)

<sup>c</sup> *Boulton v. Welch*, C. P. E. T. 1837. MS. 3 Bing. N. C. (32 Eng. C. L.) 3 Hodges.

<sup>d</sup> *Hedger v. Stevenson*, MS. T. T. 1837.

<sup>e</sup> *Beauchamp v. Cash*, 1 D. & R. N. P. C. 3. (16 Eng. C. L. 410.)

(1) (*Bank of Alexandria v. Swann*, 9 Peters, 33. Though the amount be erroneously stated and the date not given. *Bank of Rochester v. Gould*, 9 Wend. 279.)

change be dishonored for non-acceptance, notice thereof to the drawer need not contain a copy of the protest.<sup>a</sup>(1)

Where the holder of a bill of exchange wrote to the indorser the following letter, "The promissory note for 200/., drawn by S. dated 18th of July last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore give you notice thereof, and request you will let me have the amount forthwith;" it was held, on the authority of *Solarte v. Palmer*,<sup>b</sup> not to be sufficient notice of dishonor, for it did not show that the bill had been presented for payment.<sup>c</sup> But *Patteson, J.*, held, at *Nisi Prius*, and the court of King's Bench confirmed his ruling, that a notice of dishonor, conveyed a letter in the following terms, "Your bill due this day has been returned with charges, to which we request your immediate attention," was sufficient.<sup>d</sup> And in a subsequent case, where to prove notice, the following letter from the plaintiff's attorney to the defendant was put in, "I am directed by H. to give you notice that a promissory note for 99/., payable to your order two months after the date thereof, became due yesterday, and has been returned unpaid, and I have to request you will remit the amount thereof, with 1s. 6d. for noting;" the court of Exchequer held it to be sufficient. *Parke, B.*, said, that the case of *Boulton v. Welch* was an undue determination. The court was bound by the case of *Solarte v. Palmer*; but the term 'necessary implications,' as used in that case, was not to be taken in its strict sense; it meant, as Lord Eldon said, in *Wilkinson v. Adams*,<sup>e</sup> 'such a strong probability that an intention, contrary to that imputed, could not be supposed.' A notice was sufficient, if it should appear by reasonable intendment, and would be inferred by any man of business, that the bill was presented and not paid. No mercantile man, on reading this notice, could possibly misunderstand its meaning. Though this case was distinguishable from *Boulton v. Welch*, inasmuch as the notice stated that the bill was noted, yet he disclaimed going upon that distinction; the grounds of his determination were, that it appeared by necessary implication, on reading the notice, that the note had been presented and dishonored."<sup>f</sup> So where a witness, to prove notice of dishonor, stated that the day after the bill became due, he went to the drawer's house, saw the defendant's wife, and told her he had brought a bill which was dishonored; she said she knew nothing about it, but would tell her husband when he came home; held, sufficient notice of dishonor.<sup>g</sup>

<sup>a</sup> *Goodman v. Harvey*, 6 N. & M. 372.

<sup>b</sup> *Ante*, 444.

<sup>c</sup> *Boulton v. Welch*, 3 Bing. N. C. 688. (32 Eng. C. L.) 3 Hodges, 77.

<sup>d</sup> *Grugeon v. Smith*, cited in 2 Mees. & Wels. 804.

<sup>e</sup> 1 Ves. & Beam. 466.

<sup>f</sup> *Hodges v. Stevenson*, 2 Mees. & Wels. 799.

<sup>g</sup> *Housego v. Cowe*, 1 Mur. & Hur. 54.

Verbal notice is sufficient.

3.—*Mode of giving notice.*] Personal service of the notice is not necessary, nor is it requisite that the notice should be in writing.<sup>(1)</sup> A verbal notice sent to the counting-house of the party is sufficient, though there be no person there to receive it. A verbal message importing the dishonor of a bill sent to the counting-house of the drawer, during the hours of business on two successive days, the messenger knocking there and making \*noise sufficient to be heard by persons within, was held sufficient, though no person answered. *Per Lord Ellenborough*, "The counting-house is a place where all appointments respecting business and all notices should be addressed; and it is the duty of the merchant to take care that a proper person be in attendance. It has, however, been argued, that notice in writing, left at the counting-house, or put into the post, was necessary, but the law does not require it, and with whom was it to be left. Putting a letter into the post is one mode of giving notice, but where both parties are residing in the same town, sending a clerk is a more regular and less exceptionable mode."<sup>(2)</sup>

Sending notice by post is sufficient.

4.—*By post.*] Sending notice by the general or twopenny post will be sufficient, and though the letter should miscarry, the party sending it will not be prejudiced thereby;<sup>b</sup> and where there is no post, it is sufficient to send it by the ordinary conveyance.<sup>(3)</sup> It has been held, that the delivery of a letter to a bellman in the street is not equivalent to posting it.<sup>c</sup> In a recent case, however, the court seemed inclined to consider such delivery sufficient.<sup>d</sup> Where a letter was directed to Mr. Harris, Bristol, it was held insufficient without proof that he had received it, for the direction was too general in so populous a place; there might be many persons of that name at Bristol; the direction ought to specify the part of the town in which he

<sup>a</sup> *Cross v. Smith*, 1 M. & S. 545. S. P. *Goldsmith v. Bland*, Chitty, 401. *Bayley*, 276.

<sup>b</sup> *Sanderson v. Judge*, 2 H. Bl. 509. *Parker v. Gordon*, 7 East, 385. *Keith v. Weston*, 3 Esp. 54. *Langdon v. Mills*, 5 Esp. 157. *Dobree v. Eastwood*, 3 C. & P. 250. (14 Eng. C. L. 289.) *Scott v. Lifford*, 1 Campb. 246. 9 East, 347.

<sup>c</sup> *Hawkins v. Rutt*, Peake, 186.

<sup>d</sup> *Pack v. Alexander*, 3 M. & Scott, 789.

(1) (*Rahm v. Philadelphia Bank*, 1 Rawle, 335. *Cuyler v. Stevens*, 4 Wend. 556.)

(2) (Notice was taken to the store of a stranger, who said that the indorser's place of business was behind such store, and that he had gone out of town, and promised to give the notice to him so soon as he should see him. The next day or day after the indorser received the notice; held, to be insufficient. *Granite Bank v. Ayers*, 16 Pick. 392. Notice left at the indorser's boarding house, with one of the boarders, held to be sufficient. *U. S. Bank v. Hatch*, 6 Peters, 250.)

(3) (*Smith v. Hawthorn*, 3 Rawle, 355. Notice sent to the place where indorser resided at the time of the discount is sufficient, where there is no presumption from the circumstances that the holder knew of his removal. *Bank of Utica v. Phillips*, 3 Wend. 408. *Bank of Utica v. Davidson*, 5 Wend. 587. *Catskill Bank v. Stall*, 15 Wend. 364. *Wells v. Whitehead*, 15 Wend. 527. It may be sent either to the post office nearest to the indorser, or to the one to which he usually resorts for his letters. *Cuyler v. Nellis*, 4 Wend. 398. *Bank of Geneva v. Hoylett*, 4 Wend. 323.)

resided, or some other circumstance to distinguish him.<sup>a</sup> But where a bill was dated Manchester, generally, a letter directed to the drawer at Manchester, was held sufficient.<sup>b</sup> It is not necessary to prove that the letter was actually put into the post; proof that it was put on a table, in the counting-house, to be carried to the post, and that all letters put upon that table were \*invariably carried to the post office, will be sufficient.<sup>c</sup> In \*447 case of a foreign bill, it is sufficient to send it by the first regular ship for the place to which it is to be sent.<sup>d</sup>

5.—*Notice when to be given.*] Notice must be given within a reasonable time; which is a question for the determination of the court, depending on the circumstances of each particular case.<sup>e</sup>(1) When the parties reside at different places, it is a general rule, that notice by post on the day subsequent to that on which the party receives information of the dishonor is sufficient;<sup>f</sup> and if the post does not go out on the next day, notice need not be sent until the day after.<sup>g</sup> If the parties reside in the same town, notice must be given before the expiration of the day after intelligence of the dishonor has been received.<sup>h</sup> If notice be sent by the twopenny post, the letter should be posted in time for the party to receive it before the expiration of the day after notice of dishonor.<sup>i</sup> and the onus of proving that it was put into the post in time to reach the party that day, according to the course of the post lies on the person who should send it.<sup>j</sup> Though the party need not send notice until the next day, yet he may give notice after demand, on the day that the bill or note is due; for though payment may be made within the day, non-payment on presentment is a dishonor, and the other party cannot complain of the extraordinary diligence used to give him information.<sup>k</sup> But notice before the bill is due, that it will be dishonored, is not sufficient.<sup>l</sup> Where the party receives notice of the dishonor on a Sunday, Good Friday or Christmas day, or any public

Notice should be forwarded on the day after the party has been informed of the dishonor.

<sup>a</sup> *Walter v. Haynes*, R. & M. 149. (21 Eng. C. L. 402.)

<sup>b</sup> *Mann v. Moors*, *id.* 249. (21 Eng. C. L. 429.)

<sup>c</sup> *Hetherington v. Kemp*, 4 Camp. 194. *Hawkes v. Salter*, 4 Bing. 715. (15 Eng. C. L. 125.)

<sup>d</sup> *Muilman v. D'Eguino*, 2 H. Bl. 565.

<sup>e</sup> *Derbyshire v. Parker*, 6 East, 3, *ante.*

<sup>f</sup> *Williams v. Smith*, 2 B. & A. 496. *Poole v. Dicus*, 1 Hodges, 162. 1 Scott, 600.

<sup>g</sup> *Geill v. Jeremy*, M. & M. 61. (22 Eng. C. L. 249.)

<sup>h</sup> *Smith v. Mullett*, 2 Camp. 208. *Fowler v. Hendon*, 4 Tyr. 1002.

<sup>i</sup> *Id.* *Scott v. Lifford*, 9 East, 347. *Haynes v. Birks*, 3 B. & P. 599. *Hilton v. Fairclough*, 2 Camp. 633.

<sup>j</sup> *Fowler v. Hendon*, 4 Tyr. 1002.

<sup>k</sup> *Burbridge v. Manners*, 3 Camp. 193. *Ex parte Moline*, 19 Ves. 216. *Hume v. Peploe*, 8 East, 169. *Hine v. Allely*, 4 B. & Ad. 624. (24 Eng. C. L. 127.)

<sup>l</sup> *Baker v. Birch*, 3 Camp. 107.

(1) (*Hack v. Green*, 3 Gill & Johns. 474. *Bank of Alexandria v. Swann*, 9 Peters, 33. *United States v. Barker*, 4 Wash. C. C. Rep. 464. *Sewall v. Russell*, 3 Wend. 276. *Cuyler v. Stevens*, 4 Wend. 566. *Dickins v. Beal*, 10 Peters, 572.)



thanksgiving or fast day, or any festival he is in the \*same situation as if it did not reach him until the following day.<sup>a</sup>

If the holder of a bill or note places it in the hands of his banker to receive payment, the banker need not give notice of dishonor to the customer until the next day; and the customer has the like time to communicate such notice, as if he had received it from a holder.<sup>b</sup> So if the holder of a bill employs an attorney to find out where the indorser lives, and to serve him with notice, the attorney has until the day after he receives the information to apprise his client of it, and need not give notice until the third day.<sup>c</sup>

Where notice of dishonor was served too late, it having been previously served on another person on account of the indistinctness of the handwriting of the defendant; it was held, that the defendant was not thereby discharged.<sup>d</sup>

6.—*Proof of notice.*] The burden of proving notice of dishonor lies on the plaintiff:<sup>e</sup> proof that the notice was left with a person at the house where the defendant lodged, and that next morning, the notice was thrown into the plaintiff's house by a person unknown is sufficient.<sup>f</sup>(1) Where notice has been given in writing, parol evidence of the contents of such notice is admissible, without giving notice to produce such notice in writing.<sup>g</sup>(2) But where it became necessary to prove that notice of dishonor of *other bills* had been given to the defendant, for which examined copies of letters containing such notice were offered, it was held, that notice to produce such letters was necessary to admit the examined copies in evidence.<sup>h</sup>

\*449 Although proof of *mere knowledge* of dishonor is \*not sufficient, yet evidence that the drawer of a bill knew, two days after its maturity, that it was unpaid and in the hands of a particular indorsee, and objected to pay it on account of fraud in the obtaining of it, is evidence of regular notice to go to the jury.<sup>i</sup> So is a letter written by the drawer six days after he

<sup>a</sup> Bayley, 272. 7 & 8 Geo. IV, c. 15. Bray v. Hadwen, 5 M. & S. 68. Lindo v. Unsworth, 2 Camp. 602.

<sup>b</sup> Haynes v. Birkes, 3 B. & P. 599. Langdale v. Trimmer, 15 East, 291. Bayley, 274.

<sup>c</sup> *Id.* 275. Firth v. Thrush, 8 B. & C. 387. (15 Eng. C. L. 242.)

<sup>d</sup> Hewett v. Thompson, 1 M. & Rob. 543. See Siggers v. Brown, *id.* 520.

<sup>e</sup> Lawson v. Sherwood, 1 Stark. 314. (2 Eng. C. L. 405.)

<sup>f</sup> Stedman v. Gooch, 1 Esp. 5.

<sup>g</sup> Kine v. Beaumont, 3 E. & B. 288. (7 Eng. C. L. 440.) Swain v. Lewis, 1 Gale, 182; 2 C. M. & R. 261; wherein the court took time to consider the point, in consequence of some doubt thrown upon it, by the case of Solarte v. Palmer, 1 Bing. N. C. 194, (27 Eng. C. L. 35,) *ante*, 445.

<sup>h</sup> Lanauze v. Palmer, M. & M. 31. (22 Eng. C. L. 239.)

<sup>i</sup> Wilkins v. Jadis, 1 M. & Rob. 41. So where the defendant admitted to a friend that he was aware of the note being dishonored, that he had received a friendly letter on the subject, and would attend to it, it was held sufficient to warrant the jury to infer notice. Norris v. Salamonson, C. P. H. T. 1837. Law Journal.

(1) (*Hack v. Green*, 3 G. & J. 474.)

(2) (*Dickins v. Beal*, 10 Peters, 573. *Smith v. Hawthorn*, 3 Rawle, 355.)

should have received notice of dishonor, containing ambiguous expressions respecting the non-payment of the bill;<sup>a</sup> but where the defendant, in a conversation with the witness, said, "I have several good defences to the action; in the first place, the letter containing notice of dishonor was not sent to me in time;" held, (Lord Denman, C. J., *dissentiente*,) that this was not sufficient to warrant the jury in assuming that the defendant had received notice.<sup>b</sup>

7.—*By whom notice should be given.*] Notice of the dishonor of a bill or note from *any person who is a party to the instrument* will be sufficient.<sup>c</sup>(1) It was held, in some cases that notice to be effectual must come from the holder;<sup>d</sup> but these decisions have been expressly overruled by a modern case, in which Lord Denman, C. J., in delivering the judgment of the court, said, "we are compelled to determine whether the doctrine in *Tindal v. Brown* is good law—we think it is not. If it were, the holder might secure his own rights by giving a regular and immediate notice to the party next before him; but any other party to the bill would be deprived of all remedy, unless each of those parties gave regular and immediate notice, and *took up the bill* immediately."<sup>e</sup> But notice given by a person who is no party to the instrument, and who has no authority from any of the parties to give such notice, is insufficient.<sup>f</sup> Where, however, an attorney was commissioned to present a bill for payment, and on payment being refused, he gave the defendant notice of the dishonor, without stating who the holder was, or on whose behalf he gave the notice, it was held sufficient.<sup>g</sup>

Notice by any person who is a party to the bill, or his agent, is sufficient.

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Where the plaintiff, being the holder of a bill of exchange, told his attorney to give notice of dishonor in the name of a previous indorser; held, that notice given in accordance with such directions, was sufficient, though the previous indorser had not authorised it.<sup>h</sup>

8.—*To whom notice should be given.*] The holder of a dishonored bill or note should give notice to all the parties whom he intends to sue, but if he gives notice to one of the parties, Notice should be given to

<sup>a</sup> *Booth v. Jacobs*, 3 Nev. & M. 351. (28 Eng. C. L. 401.)

<sup>b</sup> *Braithwaite v. Coleman*, 1 Harr. & Wool. 229. 4 N. & M. 654. (30 Eng. C. L. 403.)

<sup>c</sup> *Jameson v. Swinton*, 2 Camp. 373. *Wilson v. Swabey*, 1 Stark. 34. (2 Eng. C. L. 283.) *Rosher v. Kieran*, 4 Camp. 87. *Chapman v. Keane*, 1 Harr. & Wool. 165. 4 N. & M. 607. 3 Ad. & Ell. 193. (30 Eng. C. L. 69.)

<sup>d</sup> *Tindal v. Brown*. 1 T. R. 167. *Ex parte Barclay*, 7 Ves. 597.

<sup>e</sup> *Chapman v. Keane*, *supra*. In this case the notice was given by an indorser to an earlier party.

<sup>f</sup> *Stewart v. Kennett*, 2 Camp. 177.

<sup>g</sup> *Woodthorpe v. Lawes*, 2 Mees. & Wels. 109.

<sup>h</sup> *Rogerson v. Hare*, 1 W. W. & Dav. 65.

(1) (*Chanoine v. Fowler*. 3 Wend. 173.)

all the parties.

Laches by one, will discharge all who had not previously received notice.

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An indorser of a note is not a new maker.

and that party gives due notice to another, and he to a third, so that the notice was regularly circulated among all the parties, it will be no objection, that the defendant did not receive notice immediately from the plaintiff.<sup>a</sup> But if there be any laches in the circulation of the notice through the several parties, even though the neglect of one is compensated by the extraordinary diligence of another, laches once committed will discharge all the parties who had not previously received due notice, and subsequent notices are invalid, for they are given by parties who are no longer liable on the bill.<sup>b</sup> "It is not enough that the drawer or indorser receives notice in as many days as there are subsequent indorsers, unless it is shown that each indorsee gave notice within a day after receiving it; as, if any one has been beyond the day, the drawer and prior indorsers are discharged."<sup>c</sup> Nor can a party in such case by waiving his own discharge, waive the discharge of antecedent parties. Where the defendant was the eighth, the plaintiff the eleventh indorser of a bill, and the instrument having passed through several subsequent hands, was dishonored at maturity and returned to the immediate indorsee of the plaintiff. It remained in his hands *three days*, after which the plaintiff paid it, and gave notice to the defendant, who received such notice in a shorter interval from the day of dishonor, than would have elapsed, had each party through whose hands the bill was returned taken the full time allowed for giving notice. Abbott, C. J., said, that the plaintiff was clearly discharged by the laches of his indorsee. He paid the bill therefore, in his own wrong, "and he cannot by so doing, place the prior indorsers in a worse situation, than that in which they otherwise would have been, consequently he was not entitled to recover from the defendant."<sup>d</sup>

Though every indorser of a bill of exchange is a new drawer, yet the indorser of a promissory note is not to be considered as a new maker; he is liable only in the character of indorser, and is entitled to notice of dishonor; for the maker of a promissory note is in the situation of an acceptor of a bill of exchange.<sup>e</sup>

Where the drawer is dead, notice should be given to his personal representatives.<sup>f</sup> If the party entitled to notice becomes bankrupt, and his assignees are not chosen, notice to him is sufficient;<sup>g</sup> but if he have absconded, and assignees be chosen, notice should be left with the assignees, or at the bankrupt's house, if open, and with the messengers in possession,<sup>h</sup> otherwise the bankrupt's estate will be discharged.<sup>i</sup> Notice to one

<sup>a</sup> Hilton v. Shepherd, 6 East, 14.

<sup>b</sup> Smith v. Mullett, 2 Camp. 308.

<sup>c</sup> Per Lord Ellenborough, in Marsh v. Maxwell, 2 Camp. 210.

<sup>d</sup> Turner v. Leech, 4 B. & A. 451. (6 Eng. C. L. 484.)

<sup>e</sup> Gwinnell v. Herbert, 2 H. & W. 194. See ante, 405.

<sup>f</sup> Bayley, 286.

<sup>g</sup> Id. 284. Ex parte Moline, 19 Ves. 216.

<sup>h</sup> Ex parte Johnson, 1 Mont. & Ayr. 622. 3 Dea. & Ch. 433.

<sup>i</sup> Rhode v. Proctor, 4 B. & C. 517. (10 Eng. C. L. 397.)

of several partners who are jointly liable is sufficient for all.<sup>a</sup> Where the party entitled to notice was abroad, notice given to his wife at his house in England, was held sufficient.<sup>b</sup>

9.—*When notice is dispensed with.*] Notice need not be given to the drawer 'when he has no effects in the hands of the acceptor, or when the holder is ignorant of his residence.(1)

The reason why the law requires that the holder of a bill or note which has been dishonored should give prompt notice thereof to the drawer and indorsers is, that the drawer may immediately withdraw his effects from the hands of the drawee, and the indorser from the hands of the maker of the note, and also that these parties may adopt measures to recover payment from other parties who may be liable to them respectively; and if prompt notice be not given, the law presumes that the drawer and indorsee have been prejudiced; but that presumption may be rebutted, by showing that the drawer had no effects in the hands of the drawee from the time the bill was drawn until it became payable; in which case, as he could not sue the drawee, he could not be prejudiced for want of notice, and consequently under such circumstances he is not entitled to any,<sup>c</sup> unless he had reasonable grounds to believe that the bill would be honored.

\*But no other proof, however clear, that the drawer had in fact not been prejudiced by want of notice will be admitted. Where, in an action by an indorsee against a drawer, it appeared that no notice had been given to the defendant of the bill being dishonored, and the plaintiff offered evidence to show that the defendant had not been prejudiced by want of notice, Lord Kenyon rejected the evidence, observing, "that the only case in which notice is dispensed with, is where the drawer has no effects in the hands of the drawee."<sup>d</sup>

If the drawer had effects in the drawee's hands at the time when the bill was drawn, he is entitled to notice, though at the time the bill was presented for acceptance, and thence until the presentment for payment, he had not any.<sup>e</sup> So, though the

When the drawer has no effects in the hands of the acceptor, notice need not be given.

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But notice must be given if the drawee

<sup>a</sup> Northouse v. Parker, 1 Camp. 82.

<sup>b</sup> Cromwell v. Hynson, 2 Esp. 511.

<sup>c</sup> Bickerdike v. Bollman, 1 T. R. 405. Legge v. Thorpe, 12 East, 171. Rogers v. Stephens, 2 T. R. 713. Chitty, 467. Bayley, 495.

<sup>d</sup> Dennis v. Morrice, 3 Esp. 158. Per Abbott, C. J., in Hill v. Heap, D. & R. N. P. C. 59. (16 Eng. C. L. 436.) "The case of Bickerdike v. Bollman has established that a party who cannot be prejudiced for want of notice shall not be entitled to require it; but this rule extends only to cases where the party has no effects, is not likely to have effects, or has no expectation that he will have any." Per Bayley, J., in Claridge v. Dalton, 4 M. & S. 226, *post*, 453.

<sup>e</sup> Orr v. Maginnis, 7 East, 359.

(1) (As to what will dispense with notice, see *Holland v. Turner*, 10 Conn. 308. *Campbell v. Pettengill*, 7 Greenleaf, 126. *Dickins v. Beal*, 10 Petcr, 572. *Juniata Bank v. Hale*, 16 Serg. & R. 157. *Ramdulollday v. Darieux*, 4 Wash. C. C. Rep. 61. *Van Wart v. Smith*, 1 Wend. 219. *Fullen v. M'Donald*, 8 Greenleaf, 213. *Union Bank v. Magruder*, 7 Peters 287. *Backus v. Shipherd*, 11 Wend. 629. *Jones v. Savage*, 6 Wend. 658. *Leonard v. Gary*, 10 Wend. 504. *Mechanics' Bank v. Griswold*, 7 Wend. 165.)

had any effects at any time after the bill was accepted and before it became payable.

Where the drawer makes provision for the bill.

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drawer had no effects in the hands of the drawee at the time the bill was drawn or accepted, if he had when it became due, he will be entitled to notice, for it is sufficient if he had effects in the hands of the drawee at any period between the time when the bill was drawn and it was payable.<sup>a</sup> And it is immaterial that the effects in the drawee's hands are not equal to the amount of the bill, or that there are several bills in the hands of the same owner becoming due on different days; the drawer is entitled to notice as to each bill, though the effects in the drawee's hands be not equal to any of them.<sup>b</sup> So where the drawer had effects in the hands of the drawee at the time of the acceptance, but was indebted to the drawee in a greater amount than the value of such effects.<sup>c</sup> So, where he had in fact no effects in the hands of the drawee from the time when the bill was drawn until it became due, but he made a provision to have some funds there, by shipping a cargo of goods to England, and directing the proceeds, when it was sold, to be paid into the drawee's hands to answer the bill; it was held, that he was entitled to notice.<sup>d</sup> So where the drawer had shipped goods to the drawee, and drew a bill on him before they arrived, and the drawee not having received the bill of lading, refused to accept the bill; held, that the drawer was entitled to notice. "A *bona fide* reasonable expectation of assets in the hands of the drawee," said Lord Ellenborough, "has been several times held to be sufficient to entitle the drawer to notice of dishonor, though such expectation may ultimately have failed to be realised."<sup>e</sup>

On the same principle, where *B.* being indebted to the drawer, represented to him that *A.* owed him money, and the drawer in consequence drew a bill upon *A.*, which *A.* accepted, but did not pay; held, that the drawer was entitled to notice of dishonor, for he had reason to expect either that *B.* would take up, or that the acceptor would pay the bill, and might, by want of notice, be induced to relax his endeavors to procure payment of the debt owing from *B.*<sup>f</sup> But where the vendor of goods sold upon credit, and drew upon the vendee a bill, which would be due long before the expiration of the stipulated credit, held, that he was not entitled to notice, because he had no reasonable expectation that the drawee would honor the bill.<sup>g</sup>

Where the drawee had no effects of the drawer in his hands, but had previous to the bill in question received acceptances of the drawer, upon which he had raised money, some of which acceptances had been returned dishonored, and others were

<sup>a</sup> Hammond v. Dufrene, 3 Camp. 145.

<sup>b</sup> Thackray v. Blakett, 3 Campb. 164. Bayley, 301.

<sup>c</sup> Blackhan v. Doren, 2 Camp. 503. Bignall v. Andrews, 7 Bing. 217. (20 Eng. C. L. 107.)

<sup>d</sup> Robins v. Gibson, 3 Camp. 334.

<sup>e</sup> Rucker v. Hiller, 3 Camp. 217. 16 East, 43.

<sup>f</sup> Lafitte v. Slatter, 6 Bing. 623. (19 Eng. C. L. 181.)

<sup>g</sup> Claridge v. Dalton, 4 M. & S. 226.

outstanding; held, that the drawer was entitled to notice.<sup>a</sup> Where the drawer had effects in the hands of the drawee, it is no excuse for not giving notice, that the drawee told the drawer he should not be able to provide for it.<sup>b</sup>

Wherever the drawer has a remedy over against a third person, \*or can show that want of notice may operate to his prejudice, he is entitled to notice, even though he has no effects in the drawee's hands. As where a bill was drawn by *A.* for the accommodation of *B.*, who indorsed it over, and neither *A.* nor *B.* had effects in the hands of the acceptor; held, that *A.* was entitled to notice of dishonor from the indorsee, and that not having received notice, he was discharged from all liability on the bill; for, if *A.* had paid the bill, he would have a remedy against *B.*, for whose accommodation he drew it, and therefore, he might be prejudiced for want of notice.<sup>c</sup>

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Where want of notice would operate to his prejudice, it should be given.

But the drawer is not entitled to notice of dishonor if the bill was accepted for his own accommodation; and if he makes the bill payable at his own house, it is evidence which will warrant the jury to infer that the acceptance was for his accommodation.<sup>d</sup> Though no consideration passed between the payee and the drawer, it is not to be considered an accommodation bill as to the drawer, if there was a valuable consideration as between the payee and the acceptor.<sup>e</sup>(1)

Accommodation bill.

It is no excuse for the neglect of notice to an indorser, that the drawer had no effects in the drawee's hands; for "the rule extends only to actions brought against the drawer; the indorser is in all cases entitled to notice, for he has no concern with the accounts between the drawer and the drawee."<sup>f</sup> Where a bill was drawn, accepted, and indorsed by several indorsers, for the accommodation of the last indorser, and the acceptor had no effects of the drawer in his hands, but that fact was not known to the defendant, (one of the prior indorsers,) held, that the defendant was entitled to notice of dishonor, before the holder of the bill could maintain an action against him; for \*the defendant, on paying the amount of the bill,

Want of effects will not dispense with notice to indorser.

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<sup>a</sup> *Spooner v. Gardiner*, R. & M. 84. (21 Eng. C. L. 386.)

<sup>b</sup> *Staples v. Okines*, 1 Esp. 332.

<sup>c</sup> *Cory v. Scott*, 3 B. & A. 619. (5 Eng. C. L. 401.) This case overrules *Walwyn v. St. Quintin*, 1 B. & P. 652, where it was held, that if an indorser have effects in the hands of the acceptor, it will not entitle the drawer to notice if he has no effects in the hands of the acceptor, though the bill was drawn for the accommodation of the indorser. *Cory v. Scott* was recognised and acted upon in *Norton v. Pickering*, 8 B. & C. 610, (15 Eng. C. L. 314,) where the same point was decided. See also *Nicholson v. Gouthit*, 2 H. Bl. 609.

<sup>d</sup> *Sharp v. Bailey*, 9 B. & C. 44. (17 Eng. C. L. 329.)

<sup>e</sup> *Scott v. Lifford*, 1 Campb. 246.

<sup>f</sup> Per Lord Kenyon, in *Wilks v. Jacks*, Peake, 202.

(1) (As to accommodation paper, see *Church v. Barlow*, 9 Pick. 547. *Douglass v. Waddle*, 1 Ohio, 191. *Stone v. Vance*, 6 Ohio, 246. *Grant v. Ellicott*, 7 Wend. 227.)



would be entitled to call upon the last indorser, for whose accommodation he put his name to the bill, for repayment.<sup>a</sup>

Ignorance of the party's residence will excuse want of notice, if due diligence be used to find it out.

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The holder is excused for not giving notice if he be ignorant of the place of residence of the party, provided he has used due diligence to discover where the drawer or indorser may be found.<sup>(1)</sup> "When the holder of a bill of exchange does not know where the indorser is to be found, it would be very hard if he lost his remedy by not communicating immediate notice of the dishonor of the bill; and I think the law lays down no such rigid rule. The holder must not allow himself to remain in a state of passive and contented ignorance; but if he use reasonable diligence to discover the residence of the indorser, I conceive that notice given as soon as this is discovered is due notice of the dishonor of the bill, within the usage and custom of merchants."<sup>b</sup> Reasonable diligence is a mixed question of law and fact, to be left to the jury after the judge has stated to them the law.<sup>c</sup> Applying to the last indorser, and last but one, the day after the bill was due, to ascertain where the drawer lived, and on his not being in the way calling again the next day, and then giving the drawer notice, has been considered sufficient.<sup>d</sup> So making inquiries at the makers of a promissory note for the residence of the payee, has been deemed sufficient.<sup>e</sup> But making inquiries respecting an indorser at the place where the bill was made payable, is not of itself sufficient to excuse the holder for not giving him notice, he ought to make inquiries of other parties to the bill, and apply to all persons of the same name in the directory. "Ignorance," said Lord Ellenborough, "may excuse notice, but reasonable diligence must be used to obtain knowledge."<sup>f</sup>

Where the drawer in transferring a bill on being asked where he resided, said that he had no regular residence, but lived amongst his friends, and he would call himself upon the acceptor, and see if the bill was paid, Lord Ellenborough held, that this dispensed with notice.<sup>g</sup>

What will dispense with proof of notice

10.—*Dispensation with proof of notice.*] As the rule requiring notice was introduced for the benefit of the party entitled to it, that party may waive the consequences of a neglect of giving due notice; and the waiver may be express or implied

<sup>a</sup> *Brown v. Maffey*, 15 East, 216. See *Smith v. Becket*, 13 East, 187. It is no excuse for not giving notice to the payee that the drawer and drawee are non-existing persons, and that their names were used for the purpose of fraud, unless the payee were privy to the fraud. *Leach v. Hewitt*, 4 Taunt. 731.

<sup>b</sup> Per Lord Ellenborough, C. J., in *Bateman v. Joseph*, 1 Campb. 462. See *Baldwin v. Richardson*, 1 B. & C. 245. (8 Eng. C. L. 66.)

<sup>c</sup> *Chitty*, 486, n.

<sup>d</sup> *Browning v. Kinnear*, Gow. 81. (5 Eng. C. L. 471.)

<sup>e</sup> *Sturges v. Derrick*, Wight. 76.

<sup>f</sup> *Beveridge v. Burgis*, 3 Camp. 262.

<sup>g</sup> *Phillipson v. Kneller*, 4 Camp. 285.

(1) (*Davis v. Herrick*, 6 Ohio, 66. *Stuckert v. Anderson*, 3 Whart. 116. *Backus v. Shepherd*, 11 Wend. 629. 13 Wend. 13.)

from circumstances. It has been held, that a subsequent promise to pay the debt will dispense with proof of notice; as where, in lieu of proof of actual notice, the defendant's letter was put in, stating "that he was an accommodation drawer, and that the bill would be paid before next term;" held, sufficient.<sup>a</sup>(1) So, payment of part of the debt,<sup>b</sup> or a promise to pay if the holder will call again.<sup>c</sup> Where the drawer of a foreign bill, on being applied to for payment, said, "my affairs are at this moment deranged, but I shall be glad to pay it as soon as my accounts with my agent are cleared:" held, sufficient to dispense with proof of the bill being protested.<sup>d</sup> So, an agreement entered into by the drawer with a prior indorser after the bill became due, to pay him the amount of the bill by instalments, was held sufficient to dispense with proof of notice, in an action by the indorsee against the drawer.<sup>e</sup> It is not necessary that the promise should be made to the plaintiff, if made to any person who \*was the holder at the time, another person afterwards taking the bill, may avail himself of such promise.<sup>f</sup> \*457

Where the drawer of a bill of exchange, being informed on the day that it became due that it was dishonored, said, that he had previously heard so, and that he intended to pay it; held, to operate as a waiver of strict notice of dishonor.<sup>g</sup> Waiver of notice.

It is immaterial that the promise or payment was made in ignorance of the law, for every man must be taken to know the law.<sup>h</sup> But a promise to pay, made after the bill became due, in ignorance of the fact that there had previously been a *refusal to accept* is not binding.<sup>i</sup> An offer to the holder of a bill of a general composition of so much in the pound on all the party's debts, though not accepted, has been held as a waiver of notice.<sup>j</sup> But the promise must be express and unconditional, and unequivocal, to operate as a waiver of notice. Where a foreigner, on application for payment being made to him, said, "I am not acquainted with your laws, if I am bound

<sup>a</sup> Wood v. Brown, 1 Stark. 217. (2 Eng. C. L. 363.) See also Brett v. Lovel, 13 East, 213. Hopes v. Alder, 6 East, 16. Margetson v. Aitken, 3 C. & P. 338. (14 Eng. C. L. 336.)

<sup>b</sup> Vaughan v. Fuller, 2 Stra. 1246. Horford v. Wilson, 1 Taunt. 12.

<sup>c</sup> Lundie v. Robertson, 7 East, 231. Rogers v. Stephens, 2 T. R. 713. Anson v. Bailey. B. N. P. 276.

<sup>d</sup> Gibbon v. Coggon, 2 Campb. 188. Greenway v. Hendley, 4 Campb. 52. Patterson, v. Beecher, 6 Moore, 319. (17 Eng. C. L. 43.)

<sup>e</sup> Gunson v. Metz, 1 B. & C. 193. (8 Eng. C. L. 58.) 2 D. & R. 334.

<sup>f</sup> *Id.* Potter v. Rayworth, 13 East, 417.

<sup>g</sup> Norris v. Salomonson, 3 Hodges, 14. 4 Scott, 257. *Ante*, 449, n.

<sup>h</sup> Bilbie v. Lumley, 2 East, 469.

<sup>i</sup> Blisard v. Hirst, 5 Burr. 2670. Goodall v. Dolley, 1 T. R. 712.

<sup>j</sup> Margetson v. Aitken, 3 C. & P. 338. (14 Eng. C. L. 336.)

(1) (If after the dishonor of a note, the indorser promise to pay it, such promise is presumptive evidence of due demand and notice. *Breed v. Hillhouse*, 7 Conn. 523. *Kepplinger v. Griffiths*, 2 Gill & Johns. 296.)

to pay I will;" held, not to amount to a waiver of notice.<sup>a</sup> The day after a bill of exchange had been dishonored in London, and before the fact of dishonor could be known in Yorkshire, the drawer's clerk called, in Yorkshire, upon the indorser prior to the holder; a conversation took place as to the bill being likely to come back, and the clerk said, "I suppose there will be no alternative but my taking up the bill, and if you will bring it to Sheffield on Tuesday, I will pay the money." The indorser did not receive either the bill or notice until some days after Tuesday, and notice of dishonor was not given to the drawer in due time; held, that the above conversation did not dispense with regular notice of dishonor.<sup>b</sup>

**Promise to pay part** A promise to pay part only, will entitle the plaintiff to that sum only, for the whole of the promise must be taken together. As where the defendant said, "I do not mean to insist on want of notice, but I am only bound to pay you 70/." held, that the plaintiff could only recover 70/., though the bill was for 200/., notice of dishonor not having been given.<sup>c</sup>

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## \*SECTION XI.

## PROTEST.

**If a foreign bill be dishonored, it should be protested.**

If a foreign bill be dishonored by non-acceptance or non-payment, it is necessary that it should be *protested* by a notary public, or (if there be no such notary near the place where the bill is payable) by an inhabitant in the presence of two witnesses, and it has been laid down in some cases, that a copy or memorial of the protest should accompany the notice of dishonor.<sup>d</sup> If the party on whom the notice is served resides in this country, it seems that a copy of the protest need not be served upon him.<sup>e</sup> But it is said that if he resides abroad it is otherwise.<sup>f</sup> However, in a recent case, where a foreign bill was protested for non-acceptance, a letter to the drawer, who resided in Ireland, stating the presentment, refusal, and *protest* but *not containing a copy of the protest*, was held sufficient.<sup>g</sup> The bill should be noted on the day it is dishonored; though the protest may be drawn up at any time before the trial.<sup>h</sup>

<sup>a</sup> Dennis v. Morris, 3 Esp. 158. Borrodaile v. Lowe, 4 Taunt. 93. Standage v. Creighton, 5 C. & P. 406. (24 Eng. C. L. 383.) Rouse v. Redwood, 1 Esp. 156. Cuming v. French, 2 Campb. 106.

<sup>b</sup> Pickin v. Graham, 1 C. & M. 725. 3 Tyr. 923.

<sup>c</sup> Fletcher v. Froggatt, 2 C. & P. 570. (12 Eng. C. L. 267.)

<sup>d</sup> Bayley. 258. Gale v. Walsh, 5 T. R. 239. Robins v. Gibson, 1 M. & S. 288. Rogers v. Stephens, 2 T. R. 713. Orr v. Maginnis, 7 East, 359.

<sup>e</sup> Bayley, 258.

See Robins v. Gibson, 1 M. & S. 288. 3 Campb. 334. Chitty, 498. B. N. P. 271.

<sup>f</sup> Goodman v. Harvey, 6 N. & M. 372, *post*. <sup>h</sup> *Id*.

Proof of the protest of a foreign bill is dispensed with under circumstances which excuse notice of the dishonor of an inland bill.<sup>a</sup> In an action on a foreign bill presented abroad, the dishonor of the bill will be proved by producing the protest purporting to be attested by a notary public.<sup>b</sup> But a protest made in England, must be proved by the notary who made it, or by the subscribing witness, if any. Such protest is not evidence of the presentment here; that fact must be proved in the same manner as if it were an inland bill.<sup>c</sup>

Inland bills may be protested for-non payment<sup>d</sup> or non-acceptance;<sup>e</sup> but it is not necessary for any purpose; there is \*no instance of a protest of an inland bill of exchange being given in evidence.<sup>f</sup> \*459

By the 2 & 3 Will. IV, c. 98, reciting that doubts having arisen as to the place in which it is requisite to protest for non-payment, bills of exchange which on the presentment for acceptance to the drawee shall not have been accepted, such bills being made payable at a place other than the place mentioned therein to be the residence of the drawee, and that it is expedient to remove such doubts, it is enacted, that all bills of exchange wherein the drawer or drawers thereof shall have expressed that such bills are to be payable in any place other than the place therein mentioned to be the residence of the drawee or drawees thereof, and which shall not on the presentment for acceptance thereof be accepted, shall and may be, without further presentment to the drawee or drawees, protested for non-payment in the place in which such bills shall have been expressed to be payable, unless the amount owing upon such bill shall have been paid to the holder on the day on which it would have been payable had the same been duly accepted.

Bills to be protested in the place in which they are expressed to be payable.

## SECTION XII.

### EFFECT OF INDULGENCE.

If after the bill or note has become due, the holder agrees to give indulgence or time for payment to any of the parties without the concurrence of the other parties, he thereby discharges all the parties who upon paying the bill or note would be entitled to sue the party to whom the indulgence

Giving time to any of the parties without the con-

<sup>a</sup> See *ante*, 456.

<sup>b</sup> *Anon.* 12 Mod. 345. *Dupays v. Shepherd*, Holt, 297. *Chitty*, 490.

<sup>c</sup> *Chesmer v. Noyes*, 4 Camp. 129.

<sup>d</sup> 9 & 10 Will. III, c. 17.

<sup>e</sup> 3 & 4 Ann. c. 9.

<sup>f</sup> Per Bayley, J., in *Windle v. Andrews*, 2 B. & A. 700.

sent of the others. was given.<sup>a</sup>(1) Where the holder of a bill sued the indorser and acceptor and took out execution against the acceptor, and received 100% from him, and took his bond for payment of the remainder by instalments, he then prosecuted the action \*460 \*against the indorser; held, that by giving time to the acceptor, he was precluded from suing any of the other parties; plaintiff nonsuited.<sup>b</sup> So where the holder of a bill received part payment from the acceptor after it became due, and took a bill from him at a future short date for the remainder; held to be a bar to an action by him against the indorsers.<sup>c</sup>

An agree- But an agreement to give time will not discharge the other ment to give time must be binding in order to discharge other parties. parties unless it be binding on the holder, and he be thereby disabled from suing the acceptor, for the holder may forbear to sue as long as he pleases. As where the executrix of the acceptor of a bill, *verbally* promised the holder to pay him the bill out of her own estate, provided he would give her reasonable time, and the holder gave her time accordingly; held, that as the contract was not in writing, it was void by the statute of frauds; and as it was not *binding* on the holder he was not thereby precluded from suing any of the other parties.<sup>d</sup>

Indulgence to the acceptor of an accommodation bill. It was formerly held that time given to the acceptor of an accommodation bill did not discharge the drawer, and that time given to the drawer discharged the acceptor, as the drawer under such circumstances was the principal debtor, and the acceptor a security only.<sup>e</sup> But that doctrine may be considered as overruled; for it is now established by numerous decisions, that the acceptor is to be considered, *in all cases*, the principal debtor primarily liable; that there is no difference between an acceptance given for accommodation, and an acceptance for value, and therefore that indulgence given to the drawer does not discharge the acceptor.<sup>f</sup>

\*461 It has been held, that an agreement, after the bill has become due and notice of dishonor given to the drawer, not to press the acceptor will not discharge the drawer; for after notice to the drawer, or what is equivalent to notice, a right to sue the drawer had attached, and the holder was not bound to sue the \*acceptor; though it would be otherwise if the agreement to forbear had been made before notice of the dishonor was given to the drawer.<sup>g</sup>

<sup>a</sup> Bayley, 338. "As to giving time, the holder does it at his peril. For in no case has it been determined, that the indorser is liable after the holder of the note has given time to the maker." Per Buller J., in *Tindal v. Brown*. 1 T. R. 169.

<sup>b</sup> *English v. Darley*, 2 Bos. & Pul. 61. *Rees v. Berrington*, 2 Ves. 540.

<sup>c</sup> *Gould v. Robson*, 8 East, 576. *Clark v. Devlin*, 3 B. & P. 365.

<sup>d</sup> *Philpott v. Bryant*, 4 Bing. 717. (15 Eng. C. L. 126.)

<sup>e</sup> *Laxton v. Peat*, 2 Camp. 185. *Collett v. Haigh*, 3 Camp. 281.

<sup>f</sup> *Fentum v. Pocock*, 5 Taunt. 192. (1 Eng. C. L. 72.) *Harrison v. Courtauld*, 3 B. & Ad. 36. (23 Eng. C. L. 25.) *Carstairs v. Rolleston*, 5 Taunt. 551. (1 Eng. C. L. 184.) *Price v. Edmunds*, 10 B. & C. 584. (21 Eng. C. L. 135.)

<sup>g</sup> *Walwyn v. St. Quintin*, 1 B. & P. 652. Bayley, 342. But if such an agreement

(1) (*Planters' Bank v. Sellman*, 2 Gill & Johns. 230. *U. S. Bank v. Hatch*, 6 Peters, 250. *Okie v. Spencer*, 1 Miles, 299. S. C. 2 Whart. 253.)

But as no party to a bill or note is discharged by indulgence given by the holder to another party, unless the latter could sue the party indulged, on paying the bill, time given by an indorsee to the payee, does not discharge the drawer.<sup>a</sup> "If the holder gave time to the payee he cannot call on the indorsers, but the rule does not apply to a party lower down on the bill; as if the fifth indorsee were to give time to the last indorser for six months, proposing in the meanwhile to endeavor to get payment from the indorsers lower down on the bill, this might well be done."<sup>b</sup> So where the holder of a bill took an indorser in execution, and let him out of gaol on a letter of license without paying the debt; held, that he was not thereby precluded from suing a *prior* indorser.<sup>c</sup>

Taking an additional security from the acceptor, without any agreement to relinquish the debt or to give time, will not discharge any of the parties.<sup>(1)</sup> As where the acceptor of a dishonored bill sent a new bill for a larger amount to the payee, who discounted it with the holder of the first, which he received back as part of the amount, and afterwards indorsed it to the plaintiff for a valuable consideration; held, that the second bill was merely a collateral security, and that the receipt of it by the payee, did not exonerate the drawer. "The rule laid down in cases of this description, is, that if time be given to the acceptor, the other parties to the bill are discharged; but in no case has it been said that taking a collateral security from the acceptor shall have that effect."<sup>d</sup> So where *B.*, being indebted to *A.*, procured *C.* to join with him in giving a joint and \*several promissory note for the amount; and afterwards having become further indebted, and being pressed by *A.* for further security, by deed, (reciting the debt, and that, for a part, a note had been given by him to *C.*, and that *A.* having demanded payment for the debt, *B.* had requested him to accept a *further* security,) assigned to *A.* all his household goods, &c., as a *further* security; held, that this deed did not extinguish or suspend the remedy on the note against *C.*<sup>e</sup>

If the holder of a joint and several promissory note enter up judgment by *cognovit* against one the makers, and levy part under a *fi. fa.*, this is no discharge of the other.<sup>f</sup> If the holder of an accommodation bill receives part from the drawer, and

Taking additional security from the acceptor will not discharge any of the parties.

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Taking part payment from one party will not

be for a consideration, or binding on the holder, so that he is thereby disabled from suing the acceptor, it will discharge the drawer, *Philpott v. Bryant*, *ante*, 460. (15 Eng. C. L. 126.) *Willison v. Whitaker*, 2 Marsh. 383. (2 Eng. C. L. 22.) *Brickwood v. Annis*, 5 Taunt. 614. (1 Eng. C. L. 210.) See *ante*, 454, *n. a.*

<sup>a</sup> *Claridge v. Dalton*, 4 M. & S. 226.

<sup>b</sup> Per Bayley, J., *id.* 232.

<sup>c</sup> *Hayling v. Mullhall*, 2 Bl. 1235.

<sup>d</sup> Per Abbott, C. J., in *Pring v. Clarkson*, 1 B. & C. 14. (8 Eng. C. L. 10.)

<sup>e</sup> *Twopenny v. Young*, 3 B. & C. 208. (10 Eng. C. L. 54.) 5 D. & R. 259. *Bedford v. Deakin*, 2 B. & A. 210.

<sup>f</sup> *Ayre v. Davenport*, 2 N. R. 474.

(1) (*Mohawk Bank v. Van Horne*, 7 Wend. 117. *Bailey v. Baldwin*, 7 Wend. 289.)



discharge another. takes a promise from him on the back of the bill for the payment of the residue at an enlarged time, it will not discharge the acceptor;<sup>a</sup> so entering into an agreement of composition with the drawer, without any provision for extinguishing the original debt, does not operate as a discharge to the acceptor.<sup>b</sup> Taking a cognovit of the acceptor after action brought against him, and giving him three weeks' time before entering up judgment, will not discharge the other parties.<sup>c</sup> So giving time to the acceptor after action brought, will not operate as a discharge of the other parties.<sup>d</sup> So where, after action brought against the maker of a promissory note, the plaintiff took his cognovit payable by instalments, with a stipulation that execution might issue for the whole on one default, and some of the instalments were payable, before the plaintiff, by proceeding with the action, could have obtained execution; held, that a co-maker of the note who was a surety was not thereby discharged, for time was not in fact given to the principal.<sup>e</sup> The obtaining of judgment against any one party without satisfaction, is no discharge of any other party;<sup>f</sup> nor is a mere offer to give \*to the acceptor, not acted upon, a discharge to any of the parties.<sup>g</sup>

**\*463** Bankruptcy of acceptor. If the acceptor of a bill or maker of a note become a bankrupt, the holder may prove under the commission and receive dividends, and if he has given regular notice of the dishonor to the other parties, they will not be discharged from their respective liabilities to him.<sup>h</sup> So where the acceptor of a bill was charged in execution by an indorsee, and was discharged under the Lords' act; held, that the drawer was not thereby discharged.<sup>i</sup> But if the holder *voluntarily* enter into a composition with the acceptor, or any of the parties, the other parties are thereby discharged; for there is a distinction between voluntarily taking a minor sum in satisfaction of a debt, where the party *has an option* to refuse less than the whole, and in taking a sum in part satisfaction of a debt by *compulsion of law*, as in cases of bankruptcy and insolvency.<sup>j</sup>

But if a party to a bill or note previously consents to indul-

<sup>a</sup> *Ellis v. Gallindo*, cited in *Dingwall v. Dunster*, Doug. 250. Chitty, 452.

<sup>b</sup> *Thomas v. Courtney*, 1 B. & A. 1.

<sup>c</sup> *Jay v. Warren*, 1 C. & P. 532. (11 Eng. C. L. 460.)

<sup>d</sup> *Pike v. Street*, 1 Dans & Lloyd, 159.

<sup>e</sup> *Price v. Edmunds*, 10 B. & C. 578. (21 Eng. C. L. 135.)

<sup>f</sup> *Claxton v. Swift*, 2 Show. 441. Lutw. 882.

<sup>g</sup> *Hewitt v. Goodrich*, 2 C. & P. 468. (12 Eng. C. L. 219.) *Badnall v. Samuel*, 3 Price, 521.

<sup>h</sup> Chitty, 454.

*Macdonald v. Bovington*, 4 T. R. 825. It was held also in this case that the drawer, having paid the bills, might sue the acceptor; for his discharge as to the indorsee was no satisfaction as to the drawer. But by the *insolvent debtors' act* the debt itself is discharged, and the insolvent cannot afterwards be sued on the bill by any party. *Boydell v. Champneys*, Ech. T. T. 1837.

<sup>j</sup> *Ex parte Wilson*, 11 Ves. 410. *Ex parte Smith*, 3 Bro. C. C. 1. And see *Lewis v. Jones*, 4 B. & C. 507. (10 Eng. C. L. 393.)

gence being given to another party, he will not be discharged thereby; as where the acceptor of a bill, having been arrested by the holder, offered a warrant of attorney for the amount of the bill payable by instalments. The holder mentioned this offer to the drawer, proposing to accept it, the drawer said, "you may do as you like, for I have had no notice of the non-payment." The court held that this amounted to an assent on the part of the drawer, and that he was not discharged by the holder's acceding to the proposal of the acceptor;<sup>a</sup> or if a party with a knowledge of the facts, subsequently assents to time being given or promise to pay, it amounts to a waiver of the discharge. As where in an action by the indorsee against the drawer of a bill, the defence was, time \*given to the acceptor, to meet which, a paper was put in, which the defendant had agreed to sign, containing an assent to the plaintiff's "using any means to obtain payment from the acceptor without prejudice of his right to recover from the drawer;" held, that it amounted to an assent to give time, and that the drawer was liable;<sup>b</sup> so where the drawer said, "I know I am liable, and if the acceptor does not pay, I will;" held, that the drawer was liable, as his expressions amounted to a waiver of his discharge.<sup>c</sup> But where a bill was renewed, and the indorser afterwards said to the acceptor, "it was the best thing' that could be done;" held, that this was no recognition of the indulgence granted to the acceptor, and that the indorser was discharged.<sup>d</sup>

An assent to indulgence is a waiver of the discharge.

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SECTION XIII.

LOST BILLS.

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1. Right of the transferee of a lost bill.		2 Remedy of loser	469

1.—*Right of the transferee.*] Though the finder of a lost bill, note, or check does not acquire a property in it, so as to enable him to enforce payment, or to defend an action brought for the recovery of it by the rightful owner, yet if he passes such instrument transferable by delivery, the party who receives it *bond fide* for a valuable consideration, without being guilty of gross negligence in taking it, is entitled to retain it against the loser, and to sue the parties liable thereon for pay-

The *bond fide* holder of a bill is entitled to sue on it, however defective the title of the party from

<sup>a</sup> Clark v. Devlin, 3 B. & P. 363.

<sup>b</sup> Hill v. Johnson, 3 C. & P. 456. (14 Eng. C. L. 387.)

<sup>c</sup> Stevens v. Lynch, 12 East, 38.

<sup>d</sup> Withall v. Masterman, 2 Camp. 179.

whom he received it may be.

ment.<sup>a</sup> Where a fair consideration has passed there must be *nula fides* to prevent the holder from recovering.<sup>b</sup> For it is a general principle that whenever one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it.<sup>c</sup>

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The *bond fide* holder of a lost bill may sue any of the parties, unless he has been guilty of gross negligence in taking it.

\*Where the agent of the plaintiff's bankers discounted a bill of exchange, for a man whom he had never seen before, who was dressed like a sailor, accompanied by another person dressed in the same manner. The bill was discolored, which the man accounted for, by saying that it had fallen into a canal with his pocket-book. This statement was corroborated by his companion; on being asked how he had got the bill, he said that he had got it from the defendant, whose name was indorsed on it, in payment of a cargo of coals. On being asked to indorse it, he said he could not write, and the agent wrote his name on it, and discounted it; about an hour and an half afterwards he returned with a similar bill, when the agent asked him if he was known in the town, and he said he did not know any one there. The agent discounted this bill also. In an action by the plaintiff against the indorser, it appeared that these bills had been lost two days previously by a sister of the defendant, she having dropped her reticule containing them into a canal. It was proved by a banker's clerk, that it was the practice in that part of the country, not to discount bills for strangers without requiring a reference. The jury found, upon questions submitted to them by the learned judge, that the plaintiffs took the bills *bond fide*, but under such circumstances that a reasonable and cautious man would not have taken them. They also found that the defendant had not used due diligence in making the loss known. A verdict was entered for the defendant, with leave to move to enter a verdict for the plaintiff, if the court should be of opinion that the defendant, having been guilty of the first negligence, was thereby estopped from setting up the negligence of the plaintiff. A rule having been obtained, and cause shown, Lord Denman, C. J., said, "This case involves a mixed question of law and fact. The law on the subject is not very well settled, and I think the rule should be made absolute. To constitute a valid defence, it was incumbent on the defendant to show that the agent of the banking company who discounted the bills had been guilty at least of *gross negligence*. The finding of the jury does not go to any thing like that extent, nor was there any evidence to warrant such finding; then as to the other

<sup>a</sup> See *ante*, 400. *Mills v. Race*, Burr. 452. *Peacock v. Rhodes*, Doug. 633. *Grant v. Vaughan*, 3 Burr. 1516. *Lee v. Newsam*, D. & R. N. P. C. 50. (16 Eng. C. L. 431.) *Backhouse v. Harrison*, 5 B. & Ad. 1098. (27 Eng. C. L. 276.) *Crook v. Jadis*, *id.* 909, *ante*, 400. (27 Eng. C. L. 234.) *De la Chaumette v. The Bank of England*, 2 B. & Ad. 385. (22 Eng. C. L. 106.) *Lawson v. Weston*, 4 Esp. 56. *Lowndes v. Anderson*, 13 East, 130.

<sup>b</sup> *Goodman v. Harvey*, 6 N. & M. 372, *post*, 466.

<sup>c</sup> Per Ashhurst, J., in *Lickbarrow v. Mason*, 2 T. 70.

question, whether negligence in the loser of a bill \*or note will deprive him of a defence which he otherwise would have against the holder, that must depend on the circumstances of each particular case. But I must say, that I do not think, that the omission of the defendant to advertise the loss of bills which had gone to the bottom of the canal, was not such negligence as to deprive him of a right which he otherwise might have had." Patteson, J., "I have no hesitation in saying, that the doctrine first laid down in *Gill v. Cubitt*,<sup>a</sup> and acted upon in other cases, that *a party who takes a bill under circumstances which ought to have excited the suspicion of a prudent man cannot recover, has gone too far, and ought to be restricted*. I can perfectly understand, that a party who takes a bill fraudulently, or under such circumstances that he must know that the person offering it to him has no right to it, will acquire no title; but I never could understand that a party who takes a bill *bonâ fide*, but under the circumstances mentioned in *Gill v. Cubitt*, does not acquire a property in it; I think that the fact found by the jury here was no defence."<sup>b</sup> And in a more recent case this doctrine has been carried still further, or rather it has been superseded. In an action by the indorsee of a bill of exchange against the drawer, it appeared that the bill had been fraudulently obtained, but that the plaintiff had given value for it. Lord Denman proposed to leave it to the jury to say whether the plaintiff had been guilty of *gross negligence* in taking the bill; upon which the plaintiff elected to be nonsuited; and on a rule to set aside the nonsuit on the ground of misdirection, Lord Denman said, "We are all of opinion, that *gross negligence* is not sufficient where a fair consideration has passed. There must be *mala fides*. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have now shaken off the last remnant of that doctrine, as to negligence in receiving bills of exchange from a party who has a defective title. Unless *mala fides* be shown, the holder for value may recover, notwithstanding any intermediate holder may have had no title to the bill."<sup>c</sup>

The holder of a bill for value is entitled to recover upon it, however defective the title of any antecedent holder may have been, unless there has been *mala fides* on his part

\*If a negotiable instrument transferable by delivery be lost or stolen, it is the duty of the party losing it to give notice of the loss as extensively as possible, so as to prevent an innocent party from taking it;<sup>d</sup> for any person receiving such an instrument with the knowledge of it having been lost, or fraudulently obtained from the owner, or under such circumstances "that he must know that the party offering it had no right to it,"<sup>e</sup>

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Proper course for the loser of a bill to take.

<sup>a</sup> 3 B. & C. 466, (10 Eng. C. L. 154,) *ante*, 401.

<sup>b</sup> *Backhouse v. Harrison*, 5 B. & Ad. 1098. (27 Eng. C. L. 276.) See *Crook v. Jadis*, *id.* 909, (27 Eng. C. L. 234,) *ante*, 490.

<sup>c</sup> *Goodman v. Hervey*, 6 N. & M. 372, *ante*, 445.

<sup>d</sup> *Per Curiam*, in *Beckwith v. Corral*, 3 Bing. 445. (13 Eng. C. L. 44.) 11 Moore, 335. *Per Best*, C. J., in *Snow v. Peacock*, 3 Bing. 408. (13 Eng. C. L. 27.)

<sup>e</sup> *Per Patteson, J.*, in *Backhouse v. Harrison*, *supra*.

cannot recover the amount from the parties to it, or retain it from the real owner. But the neglect of the owner to give due publicity to his loss, and to apprise the public of the nature thereof, may prevent him from recovering his property, where if he had used due diligence in that respect he would be entitled to it. As where the plaintiff lost his pocket-book containing a bill transferable by delivery, and advertised the pocket-book, stating that the contents were of use to no other person than himself, and not describing the bill; in an action by him against a person who had negligently taken the bill, the court held, that he was not entitled to recover, for his advertisement was calculated rather to mislead than to assist persons to whom the bill might be offered.<sup>a</sup>

The *bona fide* holder of a bank note is entitled to prompt payment of it.

\*468 The holder of a Bank of England note is *prima facie* entitled to prompt payment of it, and cannot be affected by the previous fraud of any former holder in obtaining it, unless evidence be given to bring it home to his privity. But where a Bank of England note had been fraudulently obtained by some person unknown, and on its being presented for payment some time afterwards by the agent of a foreign principal, the bank stopped it, and required the holder to account for how he obtained it: but the only account the principal would give was, that he obtained it in payment of goods from a man of whom he knew nothing. In an action of trover by the agent against the bank, it was held, that the account which the principal gave of it was sufficient evidence to be left to the jury of his privity to the original fraud, and that the agent's title was infected with the infirmity of the principal's title; and, consequently, he \*could not recover the note from the bank, though the principal was in his debt, and the note had been sent to him in reduction of the debt.<sup>b</sup> So where a Bank of England note which had been stolen, was a year afterwards presented at the bank for payment by the agent of a foreign merchant, to whom the merchant was indebted in a sum exceeding the amount of the note, and the bank stopped the note; at this time the agent had not made any advance to the foreign merchant on the credit of the note. In an action of trover by the agent against the bank, the court held, that as the plaintiff had *made no advance* to the principal on the *credit* of the note, he must be considered as representing the principal, and therefore he could not recover on his own title, and if he could recover at all, it must be upon the right of the principal; held, 2dly, that in such action, it having been proved that the note had been stolen, it was incumbent on the plaintiff to show that the foreign merchant had given such value for it as to exempt him from any reasonable

<sup>a</sup> Beckwith v. Corral, 3 Bing. 445. (13 Eng. C. L. 44.)

<sup>b</sup> Solomons v. The Bank of England, 13 East, 135, n. It did not appear in this case whether the debt had been incurred previously or subsequently to the plaintiff's receipt of the note.

ground of suspicion of any knowledge that it had been improperly obtained.<sup>a</sup>

Where a stranger of genteel appearance presented a lost note for 200*l.* at a country bank for change, and said that he had been at a cock-fight which took place that day in the neighborhood, and that he had been laying wagers and wanted to pay them off, upon which the clerk cashed it; in an action by the owner who had lost it, the question left to the jury was, whether the defendants took the note under circumstances that ought to have excited suspicion, and the jury found a verdict for the plaintiff.<sup>b</sup> In 1830, the plaintiff had his pocket picked of a 200*l.* bank note at a public meeting. The note was paid to the defendant, <sup>\*as he said,</sup> upon a bet on the Derby in 1832, but he could not say by whom; held, that the plaintiff was entitled to recover.<sup>c</sup>

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2.—*Remedy of the loser.*] If a bill or note transferable by delivery be lost or destroyed, the loser cannot maintain an action against any of the parties, either on the instrument itself, or on the consideration; his only remedy is in equity.<sup>(1)</sup>

In an action by the indorser against the acceptor of a bill of exchange, it appeared that after the bill had become due, the defendant offered to give in payment another bill, but before the bill was given, the plaintiff's clerk lost the original bill. The plaintiff offered the defendant an indemnity, but he refused to pay the amount unless the bill was produced and delivered unto him; held, that the plaintiff was not entitled to recover. Lord Tenterden, C. J.: "The opinions of judges in cases of this kind have not been uniform, and cannot be reconciled to each other. Amid conflicting opinions, the proper is to revert to the principle of these actions on bills of exchange and to pronounce such a decision as may best conform thereto. Now the principle upon which all such actions are founded is the custom of merchants. What then, is the custom in this respect? It is, that the holder of a bill shall present the instrument at its maturity to the acceptor, demand payment of its

An action cannot be maintained on a lost bill.

<sup>a</sup> *De la Chaumette v. The Bank of England*, 9 B. & C. 208. (17 Eng. C. L. 356.) *Paterson v. Hardacre*, 4 Taunt. 114.

<sup>b</sup> *Bridger v. Heath*, coram Lord Tenterden, in 1828. Chitty, 283. *Slater v. West*, 3 C. & P. 325. (14 Eng. C. L. 330.) *Snow v. Sadler*, 3 Bing. 610. (13 Eng. C. L. 69.) *Stranger v. Wigney*, 6 Bing. 677. (19 Eng. C. L. 201.) But those cases in which the question left to the jury was whether the instrument was taken under circumstances which ought to excite the suspicion of a prudent man, cannot be deemed authority at the present day. See *Backhouse v. Harrison*, and *Goodman v. Hervey*, *ante*, 466.

<sup>c</sup> *Easley v. Crockford*, 10 Bing. 243. (25 Eng. C. L. 116.) 3 M. & Scott, 700.

(1) (See, on this subject, *Swift v. Stevens*, 8 Conn. 431. 1 Selwyn, N. P. 284, [Wharton's Ed.] n. c. Where a note is shown to be lost or destroyed, it will not be presumed to be negotiable without evidence. *McNair v. Gilbert*, 3 Wend. 344. A note partly destroyed, may be declared on as entire, and proof received of the destroyed part. *Duckwall v. Weaver*, 1 Ohio, 260.)



amount, and upon receipt of the money deliver up the bill. The acceptor, paying the bill, has a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto* in his account with the drawer. If, upon offer of payment, the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer or retain his money? And if this be the right of an acceptor ready to pay at the maturity of the bill, must not his right remain the same, if, though not ready at the time, he is ready afterwards; and can his right be varied if the payment is to be made under a compulsory process of law? The foundation of his right is his own security; his voucher and his discharge towards the drawer remain unchanged; as far as regards his

\*470 \*voucher and his discharge towards the drawer, *it will be the same thing whether the instrument has been destroyed or mislaid.* With respect to his own security against a demand by another holder, there may be a difference. But how is he to be assured of the fact, either of the loss or of the destruction of the bill? Is he to rely on the assertion of the holder, or to defend an action at the peril of costs? And if the bill should afterwards appear, a fact not absolutely improbable in case of a lost bill, is he to seek for witnesses to prove the loss, and that the plaintiff must have obtained it after it became due? Has the holder a right by his own negligence or misfortune to cast this burden on the acceptor, even as a punishment for not discharging the bill the day that it became due? We think the custom of merchants does not authorise us to say that this is law. Is the holder then without remedy? Not wholly so. He may tender sufficient indemnity to the acceptor, and if it be refused, he may enforce payment thereupon in a court of equity. And this is agreeable to the mercantile law of other countries.”<sup>a</sup>

In an action by the indorser against the acceptor of a bill which had been lost after indorsement, and the plaintiff had offered the defendant an indemnity, Lord Ellenborough nonsuited the plaintiff, saying, that if a bill had been proved to have *been dishonored*, he should have no difficulty in receiving evidence of its contents, and directing the jury to find for the plaintiff. As to the indemnity, he said a court of law could not inquire into its sufficiency.<sup>b</sup>

The above *dictum* of Lord Ellenborough’s, as to an action being maintainable on a *destroyed note*, appears to have been overruled by the doctrine laid down by Lord Tenterden in the preceding case. Yet Parke, J., in a recent case, seemed to be of the same opinion with Lord Ellenborough.<sup>c</sup>

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<sup>a</sup> *Hansard v. Robinson*, 7 B. & C. 90. (14 Eng. C. L. 20.) Where in a suit on a lost bill of exchange the indemnity was disputed, and found to be proper by the master, the defendant objecting to it was held liable to the costs incurred, subsequent to the original hearing. *Macartney v. Graham*, 2 Ross & My. 353.

<sup>b</sup> *Pierson v. Hutchinson*, 2 Campb. 211.

<sup>c</sup> See *Woolford v. Whitely*, M. & M. 517. (22 Eng. C. L. 372.)

And even a subsequent promise to pay a lost bill, without a new consideration for such promise, will not entitle the loser to \*recover on it. As where a bill was lost before it became due, and the acceptor, knowing of the loss promised repeatedly to pay it; held, that the loser could not maintain an action on it against him; for the defendant was under no moral obligation to pay the plaintiff, who by his negligence had exposed the defendant to the danger of being compelled to pay another holder, and that his subsequent promise, there being no new consideration, was nudum pactum.<sup>a</sup>

A promise to pay a lost bill is not binding.

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Nor can the loser of such an instrument recover on the consideration which he gave for it. Where the plaintiff took a bill indorsed in blank by the defendant for goods sold, and lost it, held, that he could not sue the defendant either on the bill or for the goods sold; for, as by losing the bill he had deprived the defendant of his remedies over upon it against the drawer and acceptor, it would be unjust to allow him to sue the defendant for the consideration.<sup>b</sup> But if a bill or note transferable by *indorsement only*, be lost *without being indorsed*, the loser may recover either on the instrument or on the consideration; for under such circumstances the defendant could never be called upon to pay it. "There is no decision in which the party has been held to be responsible in respect of an outstanding bill *unindorsed*. In all cases in which a defendant has been holden to be discharged in respect of a supposed liability on a bill, the bill has been in such a state as to be likely to be used against him."<sup>c</sup> So if it were specially indorsed to the plaintiff and not indorsed by him.<sup>d</sup>

The loser cannot recover on the consideration:

Unless it appears that the defendant can never be called upon to pay the bill.

Where the defendant had suffered *judgment by default*, and the bill was afterwards lost, the court referred it to the master, to ascertain the amount of principal and interest, on production of the copy of a bill verified by affidavit.<sup>e</sup> But where, after action brought and notice of trial, the bill was lost; it was held \*that even though the bill had been drawn more than six years, the loser could not recover.<sup>f</sup>

Judgment by default in action on lost bill

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If a bill or note transferable by delivery be cut in halves, and one half be lost, the holder cannot recover on the other half; for payment cannot be enforced at law, only by the production of the entire instrument, or unless there be proof that the entire instrument, or whatever part of it is wanting, has been destroyed.<sup>g</sup>

Loss of one half.

If a bill or note be lost before it becomes due, the drawer

<sup>a</sup> *Davis v. Dodd*, 4 Taunt 602. Executing a bond of indemnity has been held a sufficient consideration for a new promise. *Williams v. Clements*, 1 Taunt. 523.

<sup>b</sup> *Champion v. Terry*, 3 B. & B. 295. (7 Eng. C. L. 443.)

<sup>c</sup> Per Best, C. J., in *Rolt v. Watson*, 4 Bing. 273. (13 Eng. C. L. 431.) This, however, is scarcely reconcileable with the doctrine laid down by Lord Tenterden, in *Hansard v. Robinson*, *supra*.

<sup>d</sup> *Long v. Bailie*, 2 Camp. 214.

<sup>e</sup> *Brown v. Messiter*, 3 M. & S. 281.

<sup>f</sup> *Poole v. Smith*, Holt, 144. (3 Eng. C. L. 55.)

<sup>g</sup> *Mayor v. Johnson*, 3 Campb. 324. Bayley, 374.

**Loss before due.** may be compelled to give another bill of the same tenor, on receiving an indemnity.<sup>a</sup> But a court of law has no jurisdiction to compel him; a party to be relieved under such circumstances must resort to a court of equity.<sup>b</sup>

An action does not lie against the postmaster-general for bills or notes stolen out of letters put into the post-office.<sup>c</sup> But a deputy-postmaster is liable for neglect in not duly delivering letters.<sup>d</sup> If a debtor remits a bill or note by post, or any other conveyance which the creditor directs, if the instrument be lost the loss will fall on the creditor.<sup>e</sup>

## SECTION XIV.

### OF THE CONSIDERATION.

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1. What is a sufficient consideration for a bill or note.		2. Want of consideration, effect of. . . . .	474
		3. Proof of consideration.	479

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A bill or note *prima facie* imports consideration.

1.—*What is a sufficient consideration.*] THE rules respecting the consideration for simple contracts, of which we have \*already treated,<sup>f</sup> are equally applicable to the consideration for bills of exchange; there are, however, some qualities peculiar to the latter, to which it may not be improper to advert in this place. In actions on simple contracts the consideration must be alleged and proved; but a bill of exchange or promissory note imports consideration on the face of it, and the plaintiff therefore need not allege consideration in the declaration, nor can he be called upon to prove it, unless his title be impeached by the defendant's showing that the bill had been lost or stolen, or obtained from him by fraud or duress.<sup>g</sup> Though in a simple contract a promise to pay the debt of another, without any new consideration, is not binding,<sup>h</sup> yet the debt of a third person is a good and valid consideration, for which a party may bind himself by a bill; and the consideration need not of necessity, be such as would enable the plaintiff to sue on a special contract.<sup>i</sup>

<sup>a</sup> 9 & 10 Will. III, c. 17, s. 3.

<sup>b</sup> Per Lord Tenterden, in *Hansard v. Robinson*, *ante*, 470. *Ex parte Greenaway*, 6 Ves. 812. *Bromley v. Holland*, 7 Ves. 19. *Davies v. Dodd*, 4 Price, 176. *Mossop v. Eaden*, 16 Ves. 430. *Walmsley v. Child*, 1 Ves. sen. 346.

<sup>c</sup> *Whitfield v. Lord De Spenser*, Cowp. 754.

<sup>d</sup> *Rowning v. Goodchild*, 5 Burr. 2711. 3 Wils. 443.

<sup>e</sup> *Warwicke v. Noakes*, Peake, 67. <sup>f</sup> *Ante*, 27.

<sup>g</sup> *Mills v. Barber*, 1 M. & W. 425. 2 Gale, 5. *Percival v. Frampton*, 2 C. M. & R. 180. *Low v. Chifney*, 1 Bing. N. C. 267. (27 Eng. C. L. 383.) See *post*, 482.

<sup>h</sup> *Ante*, 33.

<sup>i</sup> Per Bayley, J., in *Sowerby v. Butcher*, 2 C. & M. 372.

Where the defendant gave a note to the plaintiff, expressed to be "*for value received by my late husband*," it was held binding on her.<sup>a</sup>(1) And where a promissory note or bill of exchange expresses the consideration for which it was given, evidence will not be admitted to show a consideration differing from, or inconsistent with, the tenor of the instrument.<sup>b</sup> So, if a bill be indorsed as a *collateral security*, it is a sufficient consideration, though the indorsee did not give new credit on it.<sup>c</sup> But the liability of the acceptor is not a sufficient consideration for an indorsement, for it existed before, and cannot be considered a new consideration proceeding from the indorsee to the indorser.<sup>d</sup> An exchange of securities, as of acceptances, is an adequate consideration for a bill, and therefore cross acceptances for mutual accommodation are respectively considerations *\*for each other.*<sup>e</sup> So, if a note be given as a security for a previous debt, and the transferee gives credit to the indorser on the faith of the note, the former may be said to hold it for a valuable consideration.<sup>f</sup> But gratitude, natural love, or affection, or an intention to avoid the legacy duty, is not a sufficient consideration for a bill or note.<sup>g</sup> So, an indorsement of a bill as a gift, is not binding without some consideration; for "though a bill of exchange is an assignable contract, yet between the parties privy in contract, it does not differ from any other parol promise, and as a parol promise of a gift at a future day will not bind a man, so a gift of a bill would not be such a consideration as would sustain an action on it."<sup>h</sup>

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2.—*Want of consideration.*] A total absence of consideration, where it can be insisted upon, is a sufficient bar to the action. As where in an action by the indorsees against the acceptor, it appeared that the defendant had accepted the bill for the accommodation of one of the plaintiffs, who drew the bill and indorsed it over to himself and co-plaintiffs, and engaged to provide for the bill; held, that he and his co-plaintiffs were precluded from joining in an attempt to enforce payment

If it appears that no consideration had been given for the bill, the plaintiff cannot recover.

<sup>a</sup> *Ridout v. Bristow*, 1 C. & J. 231. 1 Tyr. 84. *Popplewell v. Wilson*, Stra. 264. Recognised by Bayley, B., *id.*

<sup>b</sup> *Ridout v. Bristow*, *supra*. See *Woodbridge v. Spooner*, 3 B. & A. 233. (5 Eng. C. L. 268.)

<sup>c</sup> *Heywood v. Watson*, 4 Bing. 496. (15 Eng. C. L. 55.)

<sup>d</sup> Per Lord Denman, C. J., in Error, in *Easton v. Pratchett*, 1 Gale, 251. 2 C. M. & R. 542.

<sup>e</sup> *Rose v. Sims*, 1 B. & Ad. 521. (20 Eng. C. L. 437.) *Cowley v. Dunlop*, 7 T. R. 565. *Buckler v. Buttivant*, 3 East, 72. *Hornblower v. Proud*, 2 B. & A. 327. *Spooner v. Gardiner*, R. & M. 84. (21 Eng. C. L. 386.)

<sup>f</sup> *Percival v. Frampton*, 2 C. M. & R. 180.

<sup>g</sup> Per Abbott, C. J., in *Holliday v. Atkinson*, 5 B. & C. 501. (11 Eng. C. L. 286.)

<sup>h</sup> Per Lord Abinger, C. B., in *Easton v. Pratchett*, 1 Gale, 33. 1 C. M. & R. 798.

(1) (The words "value received" will not preclude the maker in an action by the payee from contesting the consideration. *Raymond v. Sellick*, 10 Conn. 480.)

from the defendant.<sup>a</sup> *A.* having appointed *B.* his executor, gave him a promissory note, payable on demand, for 100*l.*, in consideration of the trouble he would have in the office of executor after his death. *B.* died in *A.*'s lifetime, not having put the note in suit. Held, in an action upon it by *B.*'s executors, that the consideration had totally failed, and the action therefore was not maintainable.<sup>b</sup>

A partial consideration.

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A partial or inadequate consideration, where it can be insisted upon, is an answer pro tanto.<sup>c</sup> As where in an action \*by the payee against the acceptor of a bill for 19*l.* 12*s.*, the defendant proved that he had value for 10*l.* only, and that he accepted for the rest to accommodate the plaintiff. Per Lord Ellenborough, "Though this, as to third persons, is a bill for 19*l.* 12*s.*, yet as between these parties the acceptance is for 10*l.* only," and that sum having been paid before the action, he non-suited the plaintiff.<sup>d</sup> So where the plaintiff, an indorsee, had advanced only a part of the money payable by the bill to the indorser, for whose accommodation the bill was accepted; held, that he was entitled to recover from the acceptor only the sum which he had advanced.<sup>e</sup> So, where the drawer of an accommodation bill for 415*l.* indorsed it to his bankers for value received, and became a bankrupt; the bankers knew it to be an accommodation acceptance, and their demand against the drawer was only 265*l.*; held, that they could only recover the latter sum from the acceptor.<sup>f</sup>

Partial failure of consideration.

But the partial failure of consideration will constitute no defence, if the quantum to be deducted on that account be unliquidated, and not of definite computation. Thus, if a bill or note be given for a stipulated price of goods previously delivered, it is no ground of defence to a part that the price of the goods was exorbitant,<sup>g</sup> or that the goods were unsound.<sup>h</sup> "I take it to be settled, that the party holding bills given for the price of goods supplied, can recover upon them unless there has been a total failure of consideration. If the consideration fails partially, as by the inferiority of the article furnished to that ordered, the buyer must seek his remedy by a cross action."<sup>i</sup>

Where, in an action by the drawer against the acceptor of a bill of exchange, it appeared that the plaintiff agreed to

<sup>a</sup> Sparrow v. Chisman, 9 B. & C. 241. (17 Eng. C. L. 366.) Jefferies v. Austen, Stra. 647.

<sup>b</sup> Solley v. Hinde, 2 C. & M. 515. 6 C. & P. 316. (25 Eng. C. L. 416.)

<sup>c</sup> Bayley, 495.

<sup>d</sup> Darnell v. Williams, 2 Stark. 166. (3 Eng. C. L. 296.)

<sup>e</sup> Wiffen v. Roberts, 1 Esp. 261. Barber v. Backhouse, Peake, 61.

<sup>f</sup> Jones v. Hibbert, 2 Stark. 304. (3 Eng. C. L. 356.) Simpson v. Clark, 2 C. M. & R. 342. 1 Gale, 237.

<sup>g</sup> Solomon v. Turner, 1 Stark. 51. (4 Eng. C. L. 291.) Bayley, 497.

<sup>h</sup> Morgan v. Richardson, 1 Campb. 40, n. 7 East, 482, n. Tye v. Gwynne, 2 Campb. 346.

<sup>i</sup> Per Lord Tenterden, in Obbard v. Betham, M. & M. 483. (22 Eng. C. L. 363.)

execute a lease of a house to the defendant for twenty-one years for 500/., to be paid by three bills, which bills the defendant accepted, and was immediately let into possession of the premises; the defence to an action on the bills was, that \*the plaintiff refused to execute the lease: Held, to be no answer to the action, for the consideration had not wholly failed, as the defendant had been let into possession; he might resort to his remedy on the agreement, if the plaintiff refused to execute the lease.<sup>a</sup>

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It is no defence to an action by the payer against the maker of a note, that the payee had agreed to convey an estate to the maker, in consideration of the note and of a further sum to be paid at a future day, and that such estate had never been conveyed; for the note was a distinct instrument from the agreement, and the defendant thereby promised to pay the amount at a certain day at all events.<sup>b</sup> It is no defence to an action by the payee, against the acceptor of a bill given for goods sold, that the vendor, two months after the delivery of them to the vendee, forcibly took possession of them: for the vendee could not treat the seizure of the goods as a dissolution of the contract, and there was not a total failure of consideration, as the defendant had the possession and enjoyment of the goods for a considerable time; he had a remedy by action against the vendor.<sup>c</sup> *A.* employed *B.*, a solicitor, to lay out money on a mortgage, who having done so, deposited the deeds with *A.*; some time afterwards *A.* having pressed for payment of interest which was in arrears, *B.* gave him a promissory note for the principal and interest, on an agreement that *A.* should deliver up the deeds to *B.*, and should hold the note until after the sale of the premises. *A.* sued *B.* on the note without having given up the deeds before the premises were sold. Held that the proper question for the consideration of the jury was, what consideration *B.* had given for the note, and whether the consideration had wholly failed or not.<sup>d</sup> It is a sufficient defence, under a plea of no consideration, that the contract in consideration of which the bill or check was given had been rescinded.<sup>e</sup>

\*But if the transaction be tainted with fraud, there is no contract, consequently no consideration; and payment of the instrument cannot be enforced. As where the plaintiff sold a horse to the defendant, warranted sound, and took a check in payment: it having appeared that the warranty was false, to the knowledge of the plaintiff, and the defendant having offered to return the horse; held, that the plaintiff was not enti-

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Fraud.

<sup>a</sup> *Moggridge v. Jones*, 14 East, 486. *Grant v. Welshman*, 16 East, 207. *Gascoigne v. Smith*, M'Clel. & Y. 349.

<sup>b</sup> *Spiller v. Westlake*, 2 B. & Ad. 157. (22 Eng. C. L. 49.)

<sup>c</sup> *Stephens v. Wilkinson*, *id.* 320. (22 Eng. C. L. 86.)

<sup>d</sup> *Richards v. Thomas*, 1 C. M. & R. 772.

<sup>e</sup> *Mills v. Oddy*, 1 Gale, 92. 2 C. M. & R. 103.



fled to recover on the check.<sup>a</sup> So, where the plaintiff distrained the defendant's goods for rent alleged to be due from the tenant, and the defendant to get rid of the distress, accepted the bills; and it afterwards appeared that no rent was in arrear; Best, C. J., left it to the jury to say, whether the plaintiff had not falsely represented to the defendant that the rent was due, in order to induce him to give his acceptance, and that if so it was fraudulent, and the defendant entitled to a verdict.<sup>b</sup> So, where an insolvent proposed to compound with his creditors, and the plaintiff, a creditor, insisted on a promissory note being given to him for the residue of his debt, as a condition of his signing the composition deed, and the insolvent accordingly gave the note without the knowledge of the other creditors; and the plaintiff and the other creditors then signed the deed; held, that the plaintiff could not recover the amount of the note, as it was a *fraud* of the other creditors.<sup>c</sup> So, where a bankrupt gave his acceptance for a certain sum to the petitioning creditor in consideration of his abandoning the prosecution of the *fiat*; the bill was held to be void, on the ground of its being an abuse of the process of the court.<sup>d</sup>

When  
want of  
considera-  
tion is no  
defence.

But the want of consideration is no defence if the plaintiff, or any intermediate party between him and the defendant, took the bill note *bona fide* for a valuable consideration.<sup>e</sup>(1) Nor is it a defence, that the plaintiff took the bill with knowledge that it was an accommodation acceptance. Where a bill is

<sup>a</sup> *Lewis v. Cosgrave*, 2 Taunt. 2. *Archer v. Bamford*, 3 Stark. 175.

<sup>b</sup> *Grew v. Bevan*, 3 Stark. 134. (14 Eng. C. L. 168.) See *Ledger v. Ewer*, Peake, 216.

<sup>c</sup> *Cockshott v. Bennett*, 2 T. R. 763, *ante*. Where see also other cases to the same effect.

<sup>d</sup> *Davis v. Holding*, 1 M. & W. 159. 1 Gale, 380.

<sup>e</sup> *Morris v. Lee*, Bayley, 500.

(1) As to what constitutes *bona fides* in the holder, consult *Grew v. Burditt*, 9 Pick. 265. *Cone v. Baldwin*, 12 Pick. 545. *Hall v. Hale*, 8 Conn. 336. *Robinson v. Lyman*, 10 Conn. 30. *Beltzshover v. Blackstock*, 3 Watts, 25. *Rumsey v. Leek*, 5 Wend. 20. *Brown v. Taber*, 5 Wend. 566. These cases support the position, that if an indorsee takes a note, heedlessly and under circumstances which ought to have excited the suspicions of a prudent and careful man, the maker or indorser may be let into his defence. But see *Ante*, pages 465-6, where, in actions on lost bills, the latest English authorities call for *mala fides*, or gross negligence, which is deemed evidence of *mala fides*.

The cases of *Wardell v. Howell*, 9 Wend. 170. *Ross v. Brotherson*, 10 Wend. 86. *Hart v. Palmer*, 12 Wend. 523. *Root v. French*, 13 Wend. 570. *Payne v. Cutler*, 13 Wend. 605. *Dickerson v. Tillinghast*, 4 Paige, 215. *Fulton Bank v. Phoenix Bank*, 1 Hall, 562; carry out the doctrine originally laid down in *Coddington v. Bay*, 20 Johns. 637—that one who takes a bill or note for a pre-existing debt, takes it subject to all the equities between the original parties. Some doubts, however, have been expressed on the subject in the Court of Errors. *Driggs v. Rockwell*, 11 Wend. 509. *Morton v. Rogers*, 14 Wend. 575. And in *Brush v. Scribner*, 11 Conn. 388, C. J. Williams, after a learned and elaborate review of all the cases, maintains the contrary. So far as the New York cases go to establish, that where the note is received in *payment* of the antecedent debt, the equities are still open, they seem highly objectionable as well on the score of principle as of policy: for a consideration as really passes as though the money had been paid and handed over in discount of the note. Where the note is taken merely as *security*, it may be remarked, that *forbearance* is usually stipulated for, or there follows a remission of those exertions, which might otherwise have secured satisfaction of the debt. See *post*, p. 478, n. a.

given for the accommodation of the drawee or payee, and that is sent \*into the world, it is no answer to an action brought on that bill, that the defendant accepted it for the accommodation of the drawer, and that that fact was known to the holder.\* But where a person took an indorsement of a promissory note from the payee, with notice that the payee was indebted to the maker in a greater amount than that in the note, on separate transactions; held, that the indorsee could not recover on the note, except to the amount of some advances he had made on the security of the note before he had the notice.<sup>b</sup> \*478

The total failure of consideration is *always* a good defence between immediate parties, as between the drawer and acceptor of a bill, between the payee and the maker of a note, between indorser and his immediate indorsee, or the drawer and payee; but in an action between remote parties, if any of the intermediate parties has given consideration for it, it will be sufficient, though the defendant was defrauded out of it and received no consideration, and even though the plaintiff gave no consideration for it; for instance, in an action by an indorsee against an acceptor of an accommodation bill, if any party to the bill gave consideration for it, it will be sufficient, though the indorsee gave none; yet an indorsee without value cannot maintain an action against the last indorser, even though all the antecedent parties had respectively given value for the bill. Absence of consideration is no defence in an action between remote parties, if any intermediate party has given value for the bill.

In an action by the third indorsee against the acceptor, evidence was given to show that the drawer, the day before the bill had arrived at maturity, procured all the indorsements to be made without consideration, in order that the action might be brought by an indorsee, on the understanding that the money when recovered should be divided between one of the indorsers and the drawer; held, that the facts were not sufficient to call on the plaintiff to prove consideration; for the drawer might have \*given a consideration, and if so, there was nothing in those facts to preclude the plaintiff from recovering.<sup>c</sup> \*479

3.—*Proof of the consideration.*] Formerly it was considered, that in order to render it incumbent on the plaintiff to prove the consideration which he gave for the instrument on which he sued, the defendant should have given him notice of his intention to insist on such proof;<sup>d</sup> but latterly such notice Plaintiff is not called upon to prove consideration until sus-

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\* Per Lord Eldon, C. J., in *Smith v. Knox*, 3 Esp. 46. *Charles v. Marsden*, 1 Taunt. 224. B. N. P. 274. But we have seen that the holder under such circumstances cannot recover more than what he advanced on the bill. *Wiffen v. Roberts*, 1 Esp. 261. *Jones v. Hibbert*, *ante*, 475. And if no credit be given on the bill or note by the holder, a bygone debt will not be such a consideration as will entitle him to recover. *De la Chaumette v. The Bank of England*, *ante*, 468. But this case can scarcely be deemed good law at the present day. See *Percival v. Frampton*, 2 C. M. & R. 180, *ante*, 474.

<sup>b</sup> *Goodall v. Ray*, 1 Harr. & Woll. 333.

<sup>c</sup> *Whittaker v. Edmunds*, 1 Ad. & Ell. 638.

*Paterson v. Hardacre*, 4 Taunt. 114. *Bayley*, 372, 500.

suspicion is thrown on his title by showing fraud.

was not deemed necessary, and the plaintiff was called upon to prove the consideration which he gave for the bill, on the defendant throwing suspicion on his title, by showing that the bill was lost or stolen, or obtained by fraud or duress, or that he had received *no consideration* for it.<sup>a</sup> As, by the new rules, however, the defendant is obliged to state in his plea the objection upon which he intends to rely, the pleadings will notify to the plaintiff whenever the consideration is intended to be disputed; and the above rule has been qualified by recent decisions, whereby it has been settled that proof by the defendant of its being an accommodation bill, or of his having received no value for it, is not of itself, unconnected with fraud sufficient to call upon the plaintiff to prove the consideration which he gave for it.

\*480 Assumpsit by the indorsee against the acceptor of a bill of exchange; plea, that the defendant accepted the bill for the accommodation of the drawer, and that the drawer did not give nor did the defendant receive any consideration for his accepting or paying the bill, and that the drawer indorsed the bill to the plaintiff without any consideration, and that the plaintiff held the bill without consideration; replication, that the drawer indorsed the bill to the plaintiff for a good and valuable consideration. Held, that it was not incumbent on the plaintiff in the first instance, to prove that he gave value for the bill. Lord Abinger, C. B., in delivering the judgment of the court, observed, that as far as his experience \*had gone, the practice was, for the plaintiff to prove consideration given by him, when he was called upon to do so by notice, or whenever the defendant proved that the bill was an accommodation bill. The judges had taken the question into their consideration, and Littledale, J., and Patteson, J., had withdrawn the opinions which they expressed in the case of *Heath v. Sanson*;<sup>b</sup> and his lordship departed from the opinion which he expressed in *Simpson v. Clarke*,<sup>c</sup> not, however, without some consideration of the public convenience. There was indeed a substantial distinction between bills given for accommodation only, and cases of fraud, inasmuch as in the former case it was to be presumed that money had been obtained on the bill. If a man came into court without any suspicion of fraud, but only as the holder of an accommodation bill, it might fairly be presumed that he was a holder for value. The proof of its being an accommodation bill was no evidence of want of consideration in the holder; unless, therefore, the bill be connected with some fraud, and a suspicion of fraud be raised from its being

<sup>a</sup> *Heath v. Sanson*, 2 B. & Ad. 291. *Thomas v. Newton*, 2 C. & P. 606. Per Lord Abinger and Bolland, J., in *Simpson v. Clarke*, 1 Gale, 237. 2 C. M. & R. 342. See *Finlayson v. M'Kenzie*, *post*. Add.

<sup>b</sup> 2 B. & Ad. 291, (22 Eng. C. L. 78,) where Parke, J., differed from Lord Tenterden, C. J., Littledale, J., and Patteson, J., on that point.

<sup>c</sup> *Ante*, 479.

shown that something has been done with it of an illegal nature, as that it has been clandestinely taken away, or has been lost or stolen, in which cases the holder must show he gave value for it, the *onus probandi* is cast upon the defendant. The decision of the present case required only to lay down this rule, that where there is no fraud, nor any suspicion of fraud, but the simple fact is that the defendant received no consideration for his acceptance, the plaintiff is not called upon to prove that he gave no value for the bill; that seems to be the opinion generally prevailing among the judges.<sup>a</sup>

The rule, therefore, is now established, that the plaintiff is not obliged to prove consideration, unless his title to the bill be impeached by *evidence*, or by his own *admission* in the pleadings, of the bill being lost or stolen, or obtained by fraud or duress. The state of the pleadings may, however, cast on the plaintiff the *\*onus* of proving the consideration in the first instance, where the only defence is want of consideration. Thus, where to a plea of no consideration in an action upon a bill of exchange, there was a replication that a consideration was given; to wit, two cows sold and delivered, &c., concluding *to the country*, it was held, that it was not incumbent on the plaintiff to prove the consideration; but if the replication had concluded with a *verification* instead of *to the country*, the plaintiff would be called upon to prove the consideration alleged in his replication, for it would be part of the issue.<sup>b</sup> Where the consideration is in dispute, the practice is for the plaintiff to prove the handwriting of the defendant, &c., and thereby make out a *prima facie* case, in the first instance, and then in answer to the defendant's case to prove consideration, or the plaintiff may prove the consideration in the first instance, but if he does he will not be allowed, after the defendant's case has been closed, to call other witnesses for the same purpose.<sup>c</sup>

Where in an assumpsit by an indorsee against the maker of a note, the defendant pleaded that the note was given for a gaming debt, and indorsed to the plaintiff with notice thereof, and without consideration; replication that the note was indorsed to the plaintiff without notice of the illegality, and for a sufficient consideration, on which issue was joined; held, that upon these pleadings the plaintiff was not called upon to prove the consideration until the defendant cast a suspicion on his title by giving evidence of the illegal concoction of the note; for the illegality of the transaction was not so far admitted on the record by the plaintiff as to dispense with evidence of it.

An admission on the record is merely a waiver of proof of that part of the record which is not denied

<sup>a</sup> *Mills v. Barber*, 1 M. & W. 425. 2 Gale, 5. *Percival v. Frampton*, 2 C. M. & R. 180. See *Low v. Chifney*, 1 Bing. N. C. 267. (27 Eng. C. L. 383.) 1 Scott, 95. *Whittaker v. Edmunds*, 1 M. & Rob. 366. 1 Ad. & Ell. 638, (28 Eng. C. L. 171,) *ante*, 479.

<sup>b</sup> *Low v. Burrows*, 2 Ad. & Ell. 483. (29 Eng. C. L. 152.) 4 N. & M. 366. 1 H. & W. 12. *Batley v. Catterall*, 1 M. & Rob. 379. Alderson.

<sup>c</sup> *Browne v. Murray*, R. & M. 254. (21 Eng. C. L. 431.)

"An admission on the record," said Alderson B., is merely a waiver of requiring proof of those parts of the record which are not denied, the party being content to rest his claim on the other facts in dispute; but if any inferences are to be drawn by the jury, they must have the facts from which inferences are to be drawn, proved like other facts."

## SECTION XV.

## USURY.

Bills or notes tainted with usury to be considered as given for an illegal consideration.

By the 12 Ann. st. 2, c. 16, all bonds, contracts and assurances, upon which more than five per cent. shall be reserved or taken, are declared to be utterly void, and any person taking or receiving more than five per cent. is rendered liable to forfeit treble the money; but by the 58 Geo. III, c. 93, innocent indorsers of bill or notes for valuable consideration were enabled to recover on such instruments, though tainted with usury; but both these statutes have been repealed by 5 & 6 W. IV, c. 41, which enacts that every note, bill, or mortgage, which would have been void by the preceding statutes, shall be deemed to have been drawn, accepted, given, or executed for an illegal consideration; and the said acts shall have the same force and effect which they would respectively have had "provided such bill or note should be deemed and taken to be made for an illegal consideration."

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\*By the latter statute, a bill or note tainted with usury is no longer to be deemed void on that account, but to be considered in the same light as if it were given for an illegal consideration; it follows, therefore, that usury is a good defence to an action on the instrument by any of the parties to the transaction, or by any person who subsequently took it with a knowledge of the usury; but a *bonâ fide* holder for valuable consideration, who took the bill or note without notice of its being tainted with usury, is entitled to recover on it <sup>b</sup> As the 5 & 6 W. IV, c. 41, does not abolish usury, but merely effects an alteration in the consequences of it, the decision under the former statutes are still applicable.

What constitutes usury.

To constitute usury there must be a *loan*, or a *forbearance*, of a debt. Therefore, if an acceptor discounts his own acceptance at a premium, it is not usury; for it is not a loan, but the payment of a debt before it becomes due,<sup>c</sup> nor is the *bonâ fide* sale of a bill for less than the amount of it usurious.<sup>d</sup>(1) But

<sup>a</sup> Edmunds v. Groves, 2 Mees & Wils. 642.

<sup>b</sup> Bayley, 504.

<sup>c</sup> Barclay q. t. v. Walmsley, 4 East, 55.

<sup>d</sup> Ex parte Lee, 1 P. Wms. 782. Rex v. Ridge, 4 Price, 56.

(1) (Cram v. Hendricks, 7 Wend. 569. Selwyn's N. P. [Ed. of 1831,] 265, n. b.)



if the sale of a bill be a mere color for a loan at unlawful interest, it will come within the statute, being a device for the purpose of evading the appearance of a loan.<sup>a</sup> It is also necessary to constitute usury, that there should be a *contract*, and intention to take more than lawful interest; as where a broker was employed to get a bill discounted, which he did upon an agreement to reserve ten shillings per cent. commission; as the party advancing the money had no *intention* that more than legal interest should be charged, it was held that the transaction was not usurious. An extra charge in discounting a bill as a remuneration for trouble, expense, or inconvenience incurred by the holder, does not render the transaction usurious, provided it be not a colorable shift to obtain more than legal interest for the loan; it is a question to be determined by the jury, whether the charge is reasonable and commensurate with the trouble and expenses incidental to the transaction, and if it be an unreasonable charge they ought to find it usurious.<sup>b</sup> The usual \*commission on discounting bills is five shillings per cent., but there is no rule of law that it shall not exceed that rate. Where a party charged 7s. 6d. per cent without proving that he had been put to expense or any considerable degree of trouble, it was deemed usurious.<sup>c</sup> To constitute usury, the contract must be for the re-payment of the principal at all events, for if the principal is put in hazard, and the payment of it to depend on a casualty, it is not usury.<sup>d</sup> The purchase of an annuity of 20/ for 60 years for 200/., was held by the court not to be usurious on the face of it; for the court could not take judicial notice that the sum ultimately received would exceed the principal and interest; but if a jury found that the transaction was a mere cloak or device for usury, and not a *bond fide* transaction, it would be deemed usurious.<sup>e</sup>

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Usury may be committed by advancing goods to be repaid in money; as if they be found upon a person applying to have a bill discounted, or for a loan of money, it raises a presumption that the transaction was usurious, so as to throw upon the party supplying the goods, if he sues on the bill, the *onus* of proving not only that the goods were estimated at what might be deemed a fair price to a purchaser who stood in need of them, but at a sum for which the borrower could render them available upon a resale.<sup>f</sup> But if the borrower prefers to take

<sup>a</sup> Dagnall v. Wigley, 11 East, 43. Wells v. Girling, 1 B. & B. 447. (5 Eng. C. L. 142.) 4 Moore, 78. Glasford v. Laing, 1 Camp. 149.

<sup>b</sup> Masterman v. Cowrie, 3 Campb. 492. Hammet v. Yea, 1 B. & P. 144. Winch q. t. v. Fenn, cited in 2 T. R. 52. Mathews q. t. v. Griffiths, Peak, 200. Carstairs v. Stein, 4 M. & S. 192. Palmer v. Baker, 1 M. & S. 56.

<sup>c</sup> Chitty, 104. Brooke v. Middleton, 1 Camp. 468.

<sup>d</sup> Per Taunton, J., in Ferguson v. Spring, 1 Ad. & Ell. 578. (28 Eng. C. L. 156.) See Holland v. Pelham, 1 C. J. 580. Gilpin v. Enderby, 5 B. & A. 954. (7 Eng. C. L. 314.)

<sup>e</sup> Ferguson v. Spring, 1 Ad. & Ell. 576. (28 Eng. C. L. 154.) 3 N. & M. 665.

<sup>f</sup> Davies v. Hardacre, 2 Camp. 575. And see Hargreaves v. Hutchinson, 2 Ad. & Ell. 12. (29 Eng. C. L. 13.) 4 N. & M. 11.



goods, or when they are offered to him he willingly accedes to the proposal in expectation of making profit of them, it lies upon him to show that they were not fairly charged if he would impeach the plaintiff's title to the bill on the ground of usury.<sup>a</sup>

\*484 The usual mode in discounting bills is to take interest at the rate of 5% per cent. upon the whole amount of the bill, at the time the money is advanced, until the time that the bill becomes due, and though that is more, in effect, than five per cent. on the money actually advanced, yet it is not deemed usurious; \*for unless that indulgence were allowed, it might not be worth while for any merchant to discount a bill.<sup>b</sup> But where a bill of exchange for 5,000£., payable three years after date, was discounted, and 750£. retained for discount, the transaction was held to be usurious, for it afforded a presumption that it was intended as a cover for usury; besides, the bill was given to secure a larger sum than the legal interest on the sum which would have been due at the end of three years, provided the bill had not been given.<sup>c</sup> Where a bill or note is given on a consideration partly usurious and partly legal, the holder cannot recover even for the legal part, though the whole amount of the bill should not be sufficient to cover that.<sup>d</sup>

What bills are not within the usury laws.

By the 3 & 4 W. IV, c. 98, s. 7, bills or notes made payable at or within three months after the date thereof, or not having more than three months to run, are exempted from the operation of the usury law; and such bills, though discounted upon usurious terms, are available securities for the full amount for which they purport to be drawn.<sup>e</sup> Therefore it has been held that a warrant of attorney given to secure the amount of an usurious bill at three months, which had been dishonored at maturity, was protected by the act.<sup>f</sup> In a declaration for usury the day from which the forbearance is to commence must be alleged, and proved precisely as stated, although laid under a *videlicet*; and if a different day is proved, or no day at all is proved, it is not sufficient.<sup>g</sup>

By 7 W. IV, & 1 Vic. c. 80, no bill of exchange payable at or within twelve months from the date thereof, or not having more than twelve months to run, shall be liable to the laws for the prevention of usury.<sup>h</sup>

A note payable on demand, is a note payable within three months from the date thereof, within the 3 & 4 W. IV, c. 98, s. 7, which makes such notes valid, in the hands of a *bona fide* holder, though tainted with usury.<sup>i</sup>

<sup>a</sup> Coombe v. Miles, 2 Camp. 553.

<sup>b</sup> Per Lord Alvanley, C. J., in Marsh v. Martindale, 3 B. & P. 158.

<sup>c</sup> *Id.*

<sup>d</sup> Harrison v. Hannel, 3 Taunt. 780.

<sup>e</sup> There is a bill upon this subject now before parliament. If it passes, it will be found in the *addenda*.

<sup>f</sup> Connop v. Yeates, 4 N. & M. 302. (29 Eng. C. L. 107.) 2 Ad. & Ell. 326.

<sup>g</sup> Fox v. Keeling, 1 Harr. & Woll. 66. 2 Ad. & Ell. 670. (29 Eng. C. L. 173.)

<sup>h</sup> 4 N. & M. 523.

<sup>i</sup> See 3 & 4 W. IV, c. 98, s. 7, *ante*, 484.

<sup>j</sup> Vallance v. Liddel, 2 N. & P. 78.

SECTION XVI.

ACTION ON A BILL OF EXCHANGE.

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1.—*Debt.*] THE usual form of action on a bill of exchange or promissory note is assumpsit, though debt will lie where there is a privity of contract between the parties. It will lie at the suit of the drawer against the acceptor,<sup>a</sup> by the payee against the drawer of a bill or maker of a note,<sup>b</sup> by an indorsee against the immediate indorser, because there is a privity between them.<sup>c</sup> “Where there is a privity (independently of any security) between the parties, and the debtor undertakes not for another’s debt, but for his own, not to a stranger, but to the creditor, and he enters into a contract to pay that debt, specifying therein that he enters into it for that debt, an action of debt lies.”<sup>d</sup> “But the case might be different where there is a want of *immediate privity* between the parties, and where the instrument omits to specify the consideration.”<sup>e</sup> And in *Bishop v. Young*, Lord Eldon said, “We do not say how the case would stand if the action were brought by any other person than he by whom the note was originally given, or against any other person than him by whom it was signed and made, or if the note itself did not express a consideration on the face of it.”

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When debt will lie on a bill of exchange or promissory note.

2.—*Assumpsit.*] As assumpsit is the general remedy on such instruments, we shall here consider that form of action only. A *bond fide* holder of a bill or note may maintain assumpsit against all the antecedent parties at the same time, or against any one of them, or against any number of them, that he thinks proper; but actual payment by one will discharge all the others from liability to the party to whom payment is made; yet a mere formal satisfaction or extinguishment of the debt as to one, such as being taken in execution or discharged under the Lords’ act, will not operate as a discharge of the other parties.<sup>f</sup> Any party to a bill or note who has been obliged to pay the holder, may sue an antecedent party; for instance, if the drawer was obliged to pay it, he may sue the

Against what parties assumpsit will lie.

<sup>a</sup> *Priddy v. Henbrey*, 1 B. & C. 674. (8 Eng. C. L. 179.)  
<sup>b</sup> *Bishop v. Young*, 2 B. & P. 83.      <sup>c</sup> *Stratton v. Hill*, 3 Price, 253.  
<sup>d</sup> Per Bayley, J., in *Priddy v. Henbrey*, 1 B. & C. 680. (8 Eng. C. L. 182.)  
<sup>e</sup> *Id.* 681.  
<sup>f</sup> *M’Donald v. Bovington*, 4 T. R. 825, *ante*, 463. *Mead v. Braham*, 3 M. & S. 91. Bayley, 334-5. *Windham v. Withers*, 1 Stra. 515. *Chitty*, 570.

\*486 acceptor if it was not an accommodation bill.<sup>a</sup> So an indorser may sue either the drawer \*or acceptor<sup>b</sup> or both, or even an antecedent indorser.<sup>c</sup> But no party to a bill can sue a subsequent party; as if a bill or note be indorsed by *A.* to *B.*, and back again by *B.* to *A.*; *A.* cannot sue *B.* upon the bill or note because *A.* would be liable over to *B.* upon his first indorsement.<sup>d</sup> If the bail of any of the parties who are sued, or any person pays the bill or note on account of any of the parties, he becomes a holder of the instrument as upon a transfer from the person for whom payment is made, not as upon a transfer from the person paid, and he can sue only such parties to the bill as the person on whose account he made the payment could sue, consequently he cannot sue any party whose name is on the bill subsequent to that of the party for whom he paid.<sup>e</sup>

If the holder sues all the persons liable at the same time, and refuses an offer made by the drawer or indorser to pay the debt and costs of the action against him, the court will make an order to restrain the holder from taking out execution, though if the debt be paid by one of the parties, the holder may still proceed with the actions against the other parties for costs, without reserving any part of the principal sum.<sup>f</sup>

Where the holder of a bill brought actions against the acceptor, the drawer, and two indorsers, the drawer and an indorser obtained a rule to stay proceedings against them on payment of the bill and costs of the actions against *them*, the plaintiff insisted that the costs of the other actions should be also paid; *sed per curiam*, "that is only necessary where the application comes from the acceptor, who is the original defaulter, and against whom all the costs occasioned by his default may be recovered."<sup>g</sup> Where a party was sued jointly with others as drawers, and separately as acceptors of a bill, the court considering him liable in the two characters, and the plaintiff entitled to both remedies, which could not be comprised in the same declaration, refused to stay the proceedings in one as vexatious.<sup>h</sup>

\*487 \*An indorser of a bill of exchange is not entitled to sue the acceptor for the costs of an action brought against him by the indorsee, for there is no privity between the indorsee and the acceptor. There is no obligation on the acceptor, except that raised by the custom of merchants, and that custom does not give the indorser a right to recover re-exchange, much less costs incurred by him in an action on the bill. Per Lord Tenterden, "Although it is the practice of the court to make

<sup>a</sup> Symonds v. Parminster, 1 Wils. 185. Louviere v. Laubray, 10 Mod. 36.

<sup>b</sup> Pownal v. Ferrand, 6 B. & C. 439. (13 Eng. C. L. 230.)

<sup>c</sup> Bayley, 332. Cowley v. Dunlop, 7 T. R. 571.

<sup>d</sup> *Ex parte* Lambert, 13 Ves. 179. Bishop v. Hayward, 4 T. R. 470. Bayley, 329. Britten v. Webb, 2 B. & C. 483. (9 Eng. C. L. 154.)

<sup>e</sup> Hall v. Pitfield, Bayley, 329.

<sup>f</sup> Toms v. Powell, 7 East, 536.

<sup>g</sup> Smith v. Woodcock, 4 T. R. 691. See Dawson v. Morgan, *infra*.

<sup>h</sup> Wise v. Proze, 9 Price, 393.

the acceptor pay the costs of all the parties when he applies to stay proceedings against himself, yet that is a matter of discretion in the court, exercised on the ground that the acceptor is asking a favor which the court would not grant, unless he would do justice, by consenting to pay the costs of all the parties incurred by his original default. But it would be a hard case upon an acceptor, where several actions were brought against him, to be obliged to pay the costs of them all.<sup>a</sup>

If the holder of a bill makes the acceptor his executor and die, the right of action against all the parties is extinguished, unless the executor formally renounces; so, if the holder of a note appoints the maker his executor.<sup>b</sup> But it would be otherwise if the maker were merely appointed *administrator*.<sup>c</sup> Where a note or bill made by several is joint and several, it is advisable to proceed in separate actions, if there be any doubt in proving the joint liability of all, or if they be not all solvent.<sup>d</sup>

A judgment, or even an execution against the *person* of any one of the parties to the bill will not discharge the others, though with respect to him it is a full satisfaction of the debt;<sup>e</sup> and if the acceptor be discharged under the Lord's act, such discharge will not operate in favor of any of the other parties.<sup>f</sup> But if the holder of a bill accept a bond from any of the parties in satisfaction of it, it will discharge other subsequent parties.<sup>g</sup> Actual payment of what is due will discharge all the parties, and though the holder of a bill may issue execution against the person of all the parties, he cannot after levying the full amount of the debt on the *goods* of one, issue a *fi. fa.* to affect the goods of another, except as to costs in the action against the latter.<sup>h</sup>

What will operate as a discharge of the parties

A joint and several bill or note.

Judgment and execution.

Discharge under the Lords' act.

Bond.

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Payment.

3.—*The declaration.*] A general rule of court, T. T. 1 W. IV, made in pursuance of the statute 11 Geo. IV, & 1 W. IV, c. 70, s. 11, prescribes certain forms of declaration on bills of exchange and promissory notes, which are intended as examples to be applied as far as practicable to other cases besides the instance there given. As the previous decisions, however, are in general still applicable, it may not be amiss to notice some of the leading points on this head.

The bill or note should be stated in the declaration in the terms in which it was made or according to its legal operation. If it be ambiguous in its terms, whether it be a bill or note, it

<sup>a</sup> Dawson v. Morgan, 9 B. & C. 618. (17 Eng. C. L. 457.)

<sup>b</sup> Freakley v. Fox, 9 B. & C. 130. (17 Eng. C. L. 342.) 4 M. & R. 18. 2 Bl. Com. 512. Mainwaring v. Newman, 2 B. & P. 124.

<sup>c</sup> *Id.* Needham's case, 8 Co. 134.

<sup>d</sup> Gray v. Palmer, 1 Esp. 135. Ch. 570.

<sup>e</sup> Ayrey v. Davenport, 2 N. R. 474. Claxton v. Swift, 3 Mod. 87.

<sup>f</sup> Macdonald v. Bovington, 4 T. R. 825.

<sup>g</sup> See Tyndal v. Brown, 1 T. R. 169. English v. Darley, 2 B. & P. 61.

<sup>h</sup> Windham v. Withers, 1 Stra. 515.

may be declared upon in one count as a bill, and in another as a note.\* A variance in any material point will be fatal.<sup>b</sup>(1)

**Variance.** A variance as to the names of parties is fatal where the allegation operates as a description of the bill; but otherwise where it merely relates to the names of the parties to the action, who might have pleaded the misnomer in abatement, provided the identity be proved.\* As where the bill was alleged to have been drawn by *Couch*, (no party to the action,) and the bill itself appeared to be drawn by *Crouch*, held a fatal variance.<sup>d</sup> But it seems that such a variance may now be amended by the judge at the trial.<sup>e</sup>

\*489 But where the declaration was against *Thomas Kay* and \*others, but whose real name was *John Key*, and the note was signed for Bowes, Hodgsons, *Key & Co.*; held, that the misnomer was no objection, it being proved that the real partner had been served with the process, and Key and Kay being *idem sonans*, the variance was immaterial.<sup>f</sup> So where an action was brought by *Willis* as payee of a note, and on production the note was made payable to *Willison*, evidence was admitted to show that he was the party really meant and to explain the mistake.<sup>g</sup>

By the 3 & 4 Will. IV, c, 42, s. 12, it is enacted, that in all actions on bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letters, or some contraction of the Christian name, it shall be sufficient in the declaration to designate such persons by the same initial letters, instead of stating their Christian names in full.

If one of several persons, acceptors of a bill, were an infant, the holder may declare on it as accepted by the adult only, in the names of both, and if the defendant pleads in abatement that the other partner ought to have been sued, the plaintiff may reply his infancy, and it is no departure.<sup>h</sup> Where a declaration described a bill as directed to three defendants and accepted by them, and it appeared to have been directed to and accepted by them and a fourth party, who was dead; held, no variance.<sup>i</sup> But a declaration alleging a note to have been

\* *Edis v. Bury*, 6 B. & C. 433. (13 Eng. C. L. 227.) *Shuttleworth v. Stephens*, 1 Camp. 407. *Chitty*, 579.

<sup>b</sup> *Bristow v. Wright*, Doug. 667. *White v. Wilson*, 2 B. & P. 116.

<sup>c</sup> 2 Stark. on Ev. 149. *Chitty*, 579.

<sup>d</sup> *Whitwell v. Bennett*, 3 B. & P. 559. See also *Hutchinson v. Piper*, 4 Taunt. 810. *Gordon v. Austen*, 4 T. R. 611.

<sup>e</sup> *Parks v. Edge*, 1 C. & M. 429.

<sup>f</sup> *Dickenson v. Bowes*, 16 East, 110.

<sup>g</sup> *Willis v. Barrett*, 2 Stark. 29. (3 Eng. C. L. 229.) *Boughton v. Frere*, 3 Camp. 29.

<sup>h</sup> *Burgess v. Merrill*, 4 Taunt. 468.

<sup>i</sup> *Mountstephen v. Brooke*, 1 B. & A. 224.

(1) (The payee of a note declared on it as payable to himself, but it appeared to be payable to himself or his order; held, that this was not a material variance, *Fay v. Goulding*, 10 Pick. 122. *Fairfield v. Adams*, 16 Pick. 381.)

made by *A.* and *B.*, is not satisfied by evidence of a note given by *A.* alone to secure a partnership debt:<sup>a</sup> though it would be otherwise if *A.* prefixed to his signature "for *A.* and *B.*."<sup>b</sup> An allegation that a bill is payable to *A.*, is proved by a bill payable to the order of *A.*<sup>c</sup>

A bill or note made by an agent may be stated as having been made by the principal, because that is its legal operation.<sup>d</sup> A bill or note may be stated according to its legal operation.<sup>e</sup> So a bill or note made payable to the *order* of the plaintiff, may be alleged as payable to him, and there is no occasion to aver that he made no order.<sup>e</sup> A note importing in the body of it to be made by several persons, but signed by one only, may be declared on as a several note.<sup>f</sup> In an action against one of several makers of a joint note, or one of several drawers of a joint bill, if it be stated as a several one made by one alone, the objection can only be taken by plea in abatement.<sup>g</sup> If the bill be in a foreign language it may be stated as if it were in English, without noticing the foreign language.<sup>h</sup> Where the money in which the bill is payable is foreign, that fact should be alleged in the declaration; as where a bill was declared upon as drawn and accepted in Dublin, to wit at Westminster, without alleging to be at Dublin in Ireland, or that the money payable was Irish, and it appeared at the trial that the bill was payable in Dublin in Irish currency, held, a fatal variance, inasmuch as the bill must be taken to have been drawn in England for English currency, which was then different from Irish currency.<sup>i</sup> But since these decisions the currency of both countries has been assimilated.<sup>j</sup> Where a bill of exchange was made payable to a fictitious payee or order, and indorsed in the name of such fictitious payee, by concert between the drawer and acceptor; held, that an innocent indorsee for valuable consideration might declare on such bill as payable to bearer,<sup>k</sup> either against the drawer or acceptor.<sup>l</sup>

An allegation respecting the consideration is unnecessary. Consideration need not be alleged. Where a declaration upon a bill of exchange was demurred to, because it was not stated to have been given for value received, the court said that it was a settled point that it was not necessary.<sup>m</sup> \*But if the plaintiff profess to state the instrument \*491

<sup>a</sup> *Siffkin v. Walker*, 2 Camp. 308. *Emley v. Lye*, 15 East, 7.

<sup>b</sup> *Lord Galway v. Mathew*, 1 Camp. 403.

<sup>c</sup> *Smith M'Clure*, 5 East, 476.

<sup>d</sup> *Heys v. Haseltine*, 2 Camp. 604. *Hemsley v. Loader*, *id.* 650. *Bayley*, 382.

<sup>e</sup> *Frederick v. Cotton*, 2 Show. 8. *Smith v. M'Clure*, 5 East, 476.

<sup>f</sup> *Roberts v. Peake*, Burr. 322.

<sup>g</sup> *Evans v. Lewis*, cited 1 B. & Al. 226. *Bayley*, 381.

<sup>h</sup> *Attorney General v. Valabreque*, Wight, 9.

<sup>i</sup> *Kearney v. King*, 2 B. & A. 301. The omission of the word *sterling* is immaterial, *id.* *Sprowle v. Legge*, 1 B. & C. 16. (8 Eng. C. L. 11.)

<sup>j</sup> By 6 Geo. IV, c. 79.

<sup>k</sup> *Collis v. Emet*, 1 H. Bl. 313.

<sup>l</sup> *Gibson v. Minet*, *id.* 569.

<sup>m</sup> *White v. Ledwich*, *Bayley*, 40. Per *Ellenborough*, in *Grant v. De Costa*, 3 M. & S. 352. But see *Creswell v. Crisp*, 2 C. M. & R. 634. 4 Tyr. 991, where a demurrer on the ground of the omission of "value received," was held not to be frivolous, in an action of debt.



accurately, and mistake it in this respect, such a variance would be fatal. A bill of exchange drawn in this form, "Pay to *T. G. B.*, or order, 315*l. value received*," and subscribed by the drawer, may be declared upon as for value received by the drawer from the drawee.<sup>a</sup> But if a bill be drawn in the usual form for value received, (which means by the drawer,) and the declaration allege it as value received from the drawee, it is a fatal variance;<sup>b</sup> an allegation that the bill was for value *received* in leather, is supported by evidence that it was for value *delivered* in leather, for the variance is immaterial.<sup>c</sup> But a bill described to have been for "value received," is not proved by the production of a bill, for "value in *wheat*;" for it does not import that the wheat was delivered.<sup>d</sup> An allegation that the note was for value received, generally, is supported by the production of a note, "for value received in Mrs. L.'s estate."<sup>e</sup>

In an action against the acceptor of a bill or maker of a promissory note, a *promise* need not be alleged, for the acceptance constitutes in effect a promise to pay;<sup>f</sup> but an action against the drawer rests on different grounds; therefore, where a declaration against the drawer omitted to allege a promise by him to pay the bill, it was held ill on special demurrer. Tindal, C. J., observed, that an acceptance constituted in effect a promise to pay, but in an action against the drawer, the bill was not a debt, but caused, by implication of law, a promise to pay, if the acceptor failed to do so, which promise should be alleged in the declaration.<sup>g</sup>

A promise to pay need not be alleged in the declaration. Allegation as to the place where it is made payable.

In an action against the indorser of a bill of exchange, a promise to pay need not be alleged, for it is not necessary that the declaration should contain an averment, which it is not competent to the defendant to deny, and by the new rules, the defendant cannot in this action plead non assumpsit.<sup>h</sup>

If a bill or note be made payable at a *particular place*, so as to make presentment at that place essential, it must be so described in the declaration, and presentment at that place must be averred and proved.<sup>i</sup> But if it be made payable *generally* \*it need not be averred to be payable at a particular place; and where such an instrument was described as payable at a particular place, it was held to be a variance.<sup>k</sup> Where the in-

<sup>a</sup> Grant v. De Costa, 3 M. & S. 351.

<sup>b</sup> Highmore v. Primrose, 5 M. & S. 65.

<sup>c</sup> Jones v. Mars, 2 Camp. 307.

<sup>d</sup> Ruled by Lord Tenterden, H. T. 1827. Chitty, 583.

<sup>e</sup> Bond v. Stockdale, 7 D. & R. 140. (16 Eng. C. L. 278.)

<sup>f</sup> Wegersloff v. Keene, Stra. 214. Bayley, 408. Starkey v. Cheesman, 1 Salk. 128.

<sup>g</sup> Henry v. Burbidge, 3 Bing. N. C. 501. (32 Eng. C. L.) 3 Hodges.

<sup>h</sup> Griffith v. Roxborough, 2 Mees. & Wels. 734. But see Henry v. Burbidge, 3 Bing. N. C. 501. (32 Eng. C. L.) 3 Hodges, 16, *ante*, 491.

<sup>i</sup> Rcwe v. Young, 2 B. & B. 165. (6 Eng. C. L. 53.) Gammon v. Schmoll, 5 Taunt. 344. (1 Eng. C. L. 128.) See *ante*, 425.

<sup>j</sup> Williams v. Waring, 10 B. & C. 2. (21 Eng. C. L. 11.) Saunderson v. Judge, 2 H. Bl. 509, *ante*, 441. Price v. Mitchell, 4 Camp. 200.

<sup>k</sup> Exon v. Russell, 4 M. & S. 505, *ante*.

strument is made payable *generally*, an averment of presentment to the acceptor or maker, or at any place specified therein, will be sufficient.<sup>a</sup> Where a bill was stated to have been accepted, payable by certain persons at a particular place, it was held, in an action against the drawer, that an averment of presentment to those persons generally, without saying at what place, was sufficient.<sup>b</sup>

In an action against the acceptor of a bill or maker of a note payable generally, it is not necessary to aver or prove presentment for payment, as the action itself is a sufficient demand.<sup>c</sup> In assumpsit on a bill of exchange drawn upon "P. P., No. 6, Bridge-row," and accepted by him, an averment that the bill when due was presented, and shown to P. P. for payment, is supported by proof that the holder went to Bridge-row to present it, but found the house shut up, and no one there.<sup>d</sup>

It is not necessary in an action against the drawer or indorser of a bill, to state that the drawee accepted it, and if stated, it need not be proved.<sup>e</sup> A conditional acceptance must be described accordingly; and if declared on as an absolute engagement, the variance will be fatal though the condition has been performed.<sup>f</sup>

In a declaration against a drawer or indorser it is necessary to aver presentment for payment to the drawee of a bill or maker of a note, on the day it became due, and that he refused to pay.<sup>g</sup> In an action by an indorsee against the \*drawer of a bill accepted by T. and G, at a London banker's the declaration did not state the acceptance at all, but stated that it was presented to T. and G. (the drawees) for payment, and that they refused to pay. The proof was presentment of the bill at maturity at the clearing house to the clerk of the London bankers named in the acceptance; held, that as the declaration did not state the acceptance, the place fixed by the acceptors was sufficiently proved, and that the London bankers were agents for that purpose to the acceptors:<sup>h</sup> or if the bill or note was not presented, the reason should be stated, as that he could not be found after diligent search.<sup>i</sup> It is also necessary to allege that the defendant had notice of the dishonor, and in case of a foreign bill, notice of a protest, or if no such notice had been

Allegation  
as to ac-  
ceptance.

Present-  
ment.

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<sup>a</sup> Hawkey v. Borwick, 4 Bing. 135. (13 Eng. C. L. 376.) Fayle v. Bird, 6 B. & C. 531. (13 Eng. C. L. 246.)

<sup>b</sup> Ambrose v. Hopwood, 2 Taunt. 61. <sup>c</sup> Frampton v. Coulson, 1 Wills. 33.

<sup>d</sup> Hine v. Allely, 4 B. & Ad. 624. (24 Eng. C. L. 127.)

<sup>e</sup> Tanner v. Bean, 4 B. & C. 312. (10 Eng. C. L. 340.) Jones v. Morgan, 3 Camp. 434.

<sup>f</sup> Langston v. Corney, 4 Camp. 176. Swan v. Cox, 1 Marsh, 176. (4 Eng. C. L. 333.)

<sup>g</sup> Mercer v. Southwell, 2 Shower, 180. Rushton v. Aspinall, Doug. 679. Lundie v. Robertson, 7 East, 231. Parker v. Gordon, id. 385.

<sup>h</sup> Harris v. Packer, 3 Tyr. 370, n.

<sup>i</sup> Firth v. Thrush, 8 B. & C. 387. (15 Eng. C. L. 242.)

given, any circumstances dispensing therewith should be stated.<sup>a</sup> On an allegation that the bill or note was presented and payment refused, the plaintiff cannot give evidence that the drawee or maker could not be found.<sup>b</sup>

Indorsement.

In an action by a remote indorsee, every indorsement which is essential to a transfer must be stated; unnecessary ones may be omitted. If the action be against an indorser, though there be several indorsements between that of the payee and defendant, all such indorsements may be omitted, and the plaintiff may declare as on an immediate indorsement from the payee to the defendant. As where a bill was drawn payable to C., who indorsed it over, and after several other indorsements it was indorsed to the defendant; it was held sufficient to state in the declaration that it was made payable to C., who indorsed it to the defendant.<sup>c</sup> If the indorsement be made before the bill is drawn, it may be alleged to have been made after the bill was drawn,<sup>d</sup> and *vice versa*.<sup>e</sup>

The common counts.

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When the action is between the intermediate parties to the bill or note, it is usual to subjoin such of the common \*counts as are applicable to the consideration for which the instrument was given. As the plaintiff in some cases will be allowed to give evidence of the consideration, if he cannot support the count on the instrument itself. As where in an action on a promissory note, the declaration contained a quantum meruit count for work and labor, which was the consideration for the note, and the note being void for want of a stamp, the court held that the plaintiff might give evidence to support the *quantum meruit* count; a promissory note was not like a bond, which merged the demand.<sup>f</sup> But if there be *no privity* between the plaintiff and defendant, as in an action by an indorsee against the acceptor of a bill or maker of a note, the common counts are not available; evidence will not be admitted to support them.<sup>g</sup>

Where the party has been discharged by *alteration* of the bill &c., or by the *laches* of the holder, the plaintiff will not be allowed to go into evidence on the common counts.<sup>h</sup> A person who is merely surety for the payment of a bill or note is not liable under the common counts.<sup>i</sup> If the instrument itself be duly stamped, it is admissible in evidence in some cases in support of the money counts. A bill is *prima facie* evidence of money had and received by the acceptor to the use of the holder, and of money paid by the holder to the use

<sup>a</sup> *Id.* Chitty, 592.

<sup>b</sup> Bayley, 401.

<sup>c</sup> Chaters v. Bell, 4 Esp. 120. Peacock v. Rhodes, Doug. 611-633. Bayley, 396.

<sup>d</sup> Russell v. Langstaffe, *ante*, 407.

<sup>e</sup> Young v. Wright, 1 Camp. 139.

<sup>f</sup> Alves v. Hodgson, 7 T. R. 241. Tyte v. Jones, 1 East, 58, n. Wade v. Beasley, 4 Esp. 7. Wilson v. Kennedy, 1 Esp. 245.

<sup>g</sup> Waynam v. Bond, 1 Camp. 175. Bentley v. Northouse, M. & M. 66. (22 Eng. C. L. 251.) Long v. Moore, 3 Esp. 155.

<sup>h</sup> Chitty, 594.

<sup>i</sup> Wells v. Girling, 3 Moore, 79. (4 Eng. C. L. 264.)

of the acceptor, and of money lent by the indorsee to the use of the indorser, and of money lent by the payee to the drawer, &c.\*

4.—*Pleadings.*] By Reg. Gen. H. T. 4 Will. IV, R. 2, it is provided, that in all actions upon bills of exchange and promissory notes, the plea of *non assumpsit* shall be inadmissible. In such actions therefore, a plea in denial must traverse some \*matter of fact, *ex. gr.*, the drawing or making, or indorsing, or accepting or presenting, or notice of dishonor of the bill or note. The object of this rule was to oblige the defendant to set out on the record the transactions which he meant to produce in evidence so as to give the plaintiff notice by the plea of the objection upon which the defendant meant to rely. In an action on a bill of exchange by an indorsee against his immediate indorser, a plea that for the indorsement the defendant neither had nor received any value or consideration, has been held good after verdict, because under this plea both parties were at liberty to go into evidence with respect to the consideration of the bill; but the court said that the plea would have been bad on special demurrer, both before and since the new rules; before the new rules, as amounting to the general issue, and since the new rules, because they require an affirmative allegation; the pleadings must show on whom lay the burden of proof, and this plea was nothing more than a traverse of that consideration which was implied in the declaration; besides it was too general, it gave no notice to the plaintiff of the objection on which the defendant meant to rely as the defence might have been, that it was an accommodation bill, or given on a gaming transaction, or for a consideration which had failed.<sup>b</sup> A defence that *A.* paid part of the bill sued on, and *B.* the residue, is the subject of separate pleas.<sup>c</sup> To a plea by the acceptor of a bill of exchange, that it was to the knowledge of the holder negotiated by fraud, and that no consideration was given for the indorsement to the holder; it is sufficient for the holder to reply generally that the bill was indorsed to him for a good consideration.<sup>d</sup> A plea alleging only that the acceptance was obtained by fraud, would not be sufficient; for if the plaintiff gave consideration for the bill without notice of the fraud, he would be entitled to recover.<sup>e</sup>

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<sup>a</sup> Bayley, 358-9. Grant v. Vaughan, Burr. 1516. Tatlock v. Harris, 3 T. R. 174. Vere v. Lewis, 3 T. R. 182. Clark v. Martin, Lord Raym. 758.

<sup>b</sup> Easton v. Pratchett, 1 Gale, 30. In Error, *id.* 250. 2 C. M. & R. 549. 1 *id.* 598. 4 Tyr. 472. S. P. in Mills v. Oddy, 1 Gale, 92. Held ill on special demurrer, in Stoughton v. Kilmorey, (Earl of,) 2 C. M. & R. 62. 1 Gale, 91. Graham v. Pitman, 1 H. & W. 132. 5 N. & M. 37. Low v. Chifney, 1 Bing. N. C. 267. (27 Eng. C. L. 383.) 1 Scott, 95.

<sup>c</sup> Easton v. Pratchett, *supra*.

<sup>d</sup> Bramah v. Roberts, or Baker, 1 Bing. N. C. 469. (27 Eng. C. L. 460.) 1 Hodges, 66.

<sup>e</sup> *Id.*

- \*496 Indorsee against the drawer of a bill of exchange; plea that \*the defendant's indorsement was in blank, that the defendant delivered the bill to *A.*, not a party thereto, to get it discounted for him, that *A.* fraudulently, and in violation of that special purpose, delivered it to *B.*, of all which the plaintiff had notice; held, on general demurrer, that the plea was bad for not showing distinctly that the defendant never had value for the bill.<sup>a</sup> To a plea of want of consideration concluding with a verification, the plaintiff, instead of replying by taking issue on the plea, merely added the *similiter*, after verdict for the plaintiff, the court held that the record was imperfect, and that there must be a repleader, but to save expense the plaintiff was allowed to amend on payment of costs.<sup>b</sup>

A plea by the acceptor of a bill of exchange, that *after the bill became due*, and before the commencement of the suit, he tendered to the plaintiff the amount of the bill with interest, and that he hath always from the *time* when the bill became due, been ready to pay the plaintiff the amount with interest, was held bad on special demurrer; *Hume v. Peploe* was a decisive authority to show that the plea must state not only that the defendant was ready to pay on the day of payment, but that he tendered on that day.<sup>c</sup>

- Where to a plea of no consideration, in an action on a bill of exchange, there is a replication that consideration was given, setting it out under a *scilicet*, and concluding *to the country*, no new matter is alleged so as to make it necessary for the plaintiff to prove the particular consideration set out.<sup>d</sup> In an action against the acceptor of a bill of exchange, a plea is repugnant which shows a consideration *for the acceptance* of the bill by the defendant, and concludes "that he has not received any value or consideration *for the payment* thereof."<sup>e</sup> In an action by the indorsee against the acceptor, a plea that the defendant accepted the bill for the accommodation of the
- \*497 \*payee without any consideration, and that the bill was indorsed to the plaintiff after it became due is bad; because *non constat*, that the plaintiff had not, before the bill was due, given full value.<sup>f</sup> In an action by the second indorsee against the payee and first indorser of a promissory note, a plea that the defendant never had any consideration for indorsing the note, and that the second indorser indorsed it to the plaintiff without any consideration, and that the plaintiff always held it without consideration, was held bad on demurrer; for there

<sup>a</sup> *Noel v. Rich*, 2 C. M. & R. 360. 1 Gale, 225.

<sup>b</sup> *Wordsworth v. Brown*, 3 Dowl. 698.

<sup>c</sup> *Poole v. Tumbridge*, 2 M. & W. 223.

<sup>d</sup> *Low v. Burrows*, 1 Harr. & Woll. 12. 2 Ad. & Ell. 483. (29 Eng. C. L. 152.) But if the plea concluded with a verification, it seems that the plaintiff should give evidence of the consideration, *id.* *Green v. Armistead*, 1 M. & Rob. 380. *Batley v. Catterall*, *id. ante*, 481.

<sup>e</sup> *Byass v. Wylie*, 1 Gale, 50. 1 C. M. & R. 686.

<sup>f</sup> Ch. Pl. 819. *Stein v. Yglesias*, 3 Dowl. 252. 1 C. M. & R. 565. Yet see Gale, 98. S. C. and 3 Ch. Pl. 820, where it is laid down as a good plea.

was no definite meaning in saying that a person made or indorsed a note without consideration; the natural meaning of the expression is, that he did the act without reflection.<sup>a</sup> A plea by an indorser that the action was commenced against him before the expiration of a reasonable time after notice of dishonor, is bad; for the cause of action arose immediately on his receiving notice of dishonor.<sup>b</sup>

In an action by an indorsee of a bill of exchange, the defendant pleaded a delivery to a prior indorser, before his indorsement to the plaintiff, of a bill for a larger amount, which he received in full satisfaction of the bill; that the prior indorser indorsed the bill so given, and that the defendant had paid the indorsee of the second bill. On special demurrer, assigning for cause, that it did not appear that the second bill was negotiable, and consequently that there was no legal payment of it; held, that that part of the plea might be rejected, and that the averment of the acceptance of a bill of a larger amount by the then holder, in satisfaction, was, without showing payment, an answer to the action.<sup>c</sup>

A plea to an action on a bill of exchange, that after it became due the defendant paid the amount, and that the holder never sustained any damage by reason of the non-payment thereof, at maturity, concluding to the country, was held bad on special \*demurrer; and the court intimated that such a plea would not be good even if it concluded with a verification, unless it went on to allege that the payment was accepted in satisfaction.<sup>d</sup> \*498

A plea to an action on a bill of exchange for 43*l.* by an indorsee against the acceptor, that after the bill became due, the drawer gave the plaintiff his promissory note for 44*l.* in full satisfaction, and that the plaintiff accepted it in satisfaction, is a good answer to the action; and a replication that the note was not paid when due, is bad on demurrer.<sup>e</sup>

In an action by an indorsee of a bill or note, if the declaration states the indorsement to have been made by the first indorser directly to the plaintiff, the plaintiff cannot avail himself of the title of any intermediate indorsee. Where issue was joined on the fact, that the bill was indorsed after it was due, held that this fact was proved by showing that the plaintiff did not become indorsee until after the bill was due, though the first indorsement was before that period.<sup>f</sup>

In an action on a bill of exchange, a plea that the consideration was cash paid by the plaintiffs as bankers on drafts made

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<sup>a</sup> *Trinder v. Smedley*, 1 H. & W. 309. 3 Ad. & Ell. 522. (30 Eng. C. L. 143.) 5 N. & M. 138.

<sup>b</sup> *Siggers v. Lewis*, 1 C. M. & R. 370.

<sup>c</sup> *Lewis v. Lyster*, 1 Gale, 320. 2 C. M. & R. 704. 4 Dowl. 377. See *Goldshede v. Cottrell*, 2 Mees. & Wels. 20.

<sup>d</sup> *Chapman v. Vandevelde*, 1 Harr. & Woll. 685.

<sup>e</sup> *Sard v. Rhodes*, 1 Mees. & Wels. 153. 1 Gale, 376.

<sup>f</sup> *Stein v. Yglesias*, *ante*, 497. See *Goodall v. Ray*, 1 H. & W. 333, *ante*, 429, 478.



more than fifteen miles from their place of business, &c., was held bad after pleading over, it containing no allegation that the drafts were payable to bearer, payable on demand, or that the amount of any of them was forty shillings.<sup>a</sup>

In an action against the maker of a promissory note, payable at a given time, it is an inadmissible defence, that there was a parol agreement that on a certain event happening no action should be brought, for that would be to contradict a written contract by parol evidence.<sup>b</sup> But in an action by the indorsee against the acceptor of a bill of exchange, it is competent to the acceptor to plead that the acceptance was for the accommodation of the plaintiff, and that he has received no consideration from the drawer, and that it was agreed that when the bill became due it should be taken up by the plaintiff.<sup>c</sup> In an action  
 \*499 \*by the indorser against the acceptor of a bill of exchange, the defendant may show, under a plea denying the acceptance, that a material alteration was made in the bill since he accepted it, whereby it was vitiated.<sup>d</sup>

5.—*Judgment by default.*] If the defendant suffer judgment to go by default, the plaintiff may apply to the court in term time, or to a judge in vacation, on an affidavit of the nature of the action, for a rule to show cause why it should not be referred to the master in the Court of King's Bench and Exchequer, and to the prothonotaries in the Common Pleas, to ascertain what is due for principal and interest; and upon an affidavit of service of a copy of this rule, the court will make it absolute, unless good cause be shown against it, and final judgment will be signed upon the sum ascertained by the officer to be due.<sup>e</sup> The defendant may appear before the master and give evidence in reduction of the sum recoverable.<sup>f</sup> But he will not be allowed to give in evidence any matter in defeasance of the action.<sup>g</sup> Nor will he be allowed to show as cause against the reference, any irregularity in the proceedings previous to the judgment.<sup>h</sup>

6.—*Trover.*] We have seen that an action of assumpsit or debt will lie upon a bill or note; it may also be observed, that *trover* or *detinue* will lie *for* such an instrument, at the suit of the party entitled to it, whenever it has been unduly obtained, or is detained contrary to the purpose for which it was delivered

<sup>a</sup> Green v. Allday, 1 Gale, 218. M'Dowall v. Lyster, 2 Mees. & Wels. 52.

<sup>b</sup> Forster v. Sibley, 1 Gale, 10, *nom.* Foster v. Jolly, 1 C. M. & R. 703.

<sup>c</sup> Thompson v. Clubbley, 1 Mees. & Wels. 212, *ante*, 427.

<sup>d</sup> Cock v. Coxwell, 1 Gale, 177. 2 C. M. & R. 291.

<sup>e</sup> Rashleigh v. Salmon, 1 H. Bl. 252. Andrews v. Blake, *id.* 529. Biggs v. Stuart, 4 Price, 134.

<sup>f</sup> Branning v. Patterson, 4 Taunt. 487.

<sup>g</sup> East India Company v. Glover, 1 Stra. 612. Shepherd v. Charter, 4 T. R. 275

<sup>h</sup> Pell v. Brown, 1 B. & P. 369. Marshall v. Van Omeran, Chitty, 602.

either to an agent or to any person aware of the circumstance.<sup>a</sup> Such an action will lie even at the suit of a person who is no party to the bill.<sup>b</sup> If a party authorised by the holder of a \*bill of exchange to get it discounted and to apply the proceeds in a particular way, does get it discounted, but misapplies the proceeds, he cannot be sued in trover; the proper remedy is to sue him for money had and received.<sup>c</sup> \*500

But to maintain such an action the plaintiff must have a property in the bill, and there must be a tortious conversion of it by the defendant. Where *A.*, resident abroad, remitted to *B.*, his agent in England, a bill drawn by *A.*, and specially indorsed by him to *C.*, with whom his children were at school, in payment of *C.*'s account for their board and education; *B.* got the bill accepted by the drawee, and sent a letter by post to *C.*, stating that he had received a commission from *A.* to pay her some money on account of his children, and desired to be informed when and how it should be delivered; while the bill remained in *B.*'s hands, he received directions from *A.* to keep it and the proceeds in his hands, and to have a fair investigation into *C.*'s accounts, and after such investigation to pay her what might be due to her; no such investigation took place, and *B.* detained the bill; held, that *C.* could not recover it in trover, for there was nothing in the conduct of *B.* to show that he had contracted any new relation with *C.* The fact of his communicating to her that he had received the bill for her use, could not have the effect of transferring the property. The direction of *A.* was countermandable until it was executed by the actual delivery of the bill to *C.*, or by some binding engagement entered into between *B.* and *C.*, which gave the latter a right of action against the former; nothing passed between *B.* and *C.* to alter the relation of the parties.<sup>d</sup>

## SECTION XVII.

### COMPETENCY OF WITNESS.

A PARTY to a bill or note is, in general, a competent witness in an action on such instrument, unless he be directly interested in the event of the suit.(1)

When a party to the instrument may be a witness.

<sup>a</sup> *Evans v. Kymer*, 1 B. & Ad. 528. (20 Eng. C. L. 437.) *Goggerly v. Cuthbert*, 2 N. R. 170. *Johnson v. Windle*, 3 Bing. N. C. 225. (32 Eng. C. L.)

<sup>b</sup> *Treuttel v. Barandon*, 8 Taunt. 100. (4 Eng. C. L. 33.)

<sup>c</sup> *Palmer v. Jarman*, 2 Mees. & Wels. 282.

<sup>d</sup> *Brind v. Hampshire*, 1 M. & Webs. 365.

(1) (It is a well settled principle, that no man who is a party to a negotiable note, shall be permitted by his own testimony to invalidate it. Having given it the sanction of his name,

\*If his interest be equally affected, whichever way the verdict goes, he is competent to give evidence for either party.<sup>a</sup> Thus, in an action by an indorsee against the acceptor of a bill, the drawer is competent to prove the hand-writing of the defendant,<sup>b</sup> and his own indorsement,<sup>c</sup> or on behalf of the defendant he may prove usury;<sup>d</sup> or that the bill has been paid.<sup>e</sup> For if the plaintiff recovers, the drawer pays through the acceptor, to whom he is liable; if the plaintiff fails, the drawer is liable to pay the bill himself. But if the bill was accepted for the accommodation of the drawer, the latter would not be a competent witness for the defendant. For though whichever party succeeded, the drawer would be equally liable to the other for the amount of the bill, and consequently would be indifferent in that respect, yet, if there was a verdict against the acceptor, the drawer would be obliged to pay him not only the amount of the bill, but also the costs of action, whereas he would not be liable to the indorsee for such costs; it would, therefore, be to his interest that the defendant should have a verdict.<sup>f</sup> In a very recent case, however, Mr. Baron Parke received such evidence, and indorsed the name of the witness on the *postea*, pursuant to 3 & 4 W. IV, c. 42, s. 26, saying that the witness could only be made liable to the costs by means of the verdict and judgment, which in consequence of his name being indorsed on the *postea* could not be used against him.<sup>g</sup>

In an action against one of several makers of a note, any of the joint makers is a competent witness for the plaintiff, for he stands indifferent, being liable in the event of a verdict being for the defendant, to an action at the suit of the plaintiff for the whole, with a claim on the defendant for contribution, and if the plaintiff succeeds, the witness will be liable to the defendant for contribution.<sup>h</sup> In an action by the indorsee of

\*502 \*a note against an indorser, the maker is a competent witness for either party, for whichever party succeeds, the maker will be liable to pay the unsuccessful party.<sup>i</sup> In an action against the drawer of a bill, the acceptor is competent to prove that he had no effects of the drawer's in his hands, in order to

<sup>a</sup> 2 Stark. Ev. 179. Bayley, 532.

<sup>b</sup> Dickinson v. Prentice, 4 Esp. 32.

<sup>c</sup> Richardson v. Allan, 2 Stark. 334. (3 Eng. C. L. 371.)

<sup>d</sup> Brard v. Ackerman, 5 Esp. 119. Rich v. Topping, Peake, 224.

<sup>e</sup> Humfrey v. Moxon, Peake, 52.

<sup>f</sup> Jones v. Brooke, 4 Taunt. 464. Burgess v. Cuthill, 6 C. & P. 282. (25 Eng. C. L. 399.) 1 M. & Rob. 315. Lyndhurst.

<sup>g</sup> Faith v. M'Intyre, 7 C. & P. 44. (32 Eng. C. L.)

<sup>h</sup> York v. Blott, 5 M. & S. 71.

<sup>i</sup> Venning v. Shuttleworth, Bayley, 536.

and thereby added to the value of the instrument, by giving it currency, he shall not be permitted to testify, that the note was given for a gambling consideration, or under any other circumstances which would destroy its validity. *U. S. Bank v. Dunn*, 6 Peters, 57. *Bank of the Metropolis v. Jones*, 8 Peters, 12. The current of authority in the United States is against permitting a party to a negotiable instrument to be a witness to prove it originally void. But he is held to be a good witness to prove any facts, subsequent to the due execution of the note, which destroys the title of the holder. 1 Selwyn's N. P. [Ed. of 1831,] 315, and the American cases there cited. *Spring v. Lovett*, 11 Pick. 417. *Hall v. Hale*, 8 Conn. 336.)

excuse the neglect of giving him due notice; for, though by supporting the action against the drawer, he may relieve himself from liability to the holder, yet he, at the same time, subjects himself to an action at the suit of the drawer, in which his evidence in the present action could not avail him.<sup>a</sup>

In an action by the indorsee against the drawer of a bill, a prior indorser is a competent witness for the plaintiff to prove his own indorsement;<sup>b</sup> or that the defendant promised to pay the bill after it became due.<sup>c</sup> He is also a competent witness for the defendant, to prove that the bill was paid;<sup>d</sup> or that an unstamped bill dated abroad was in fact made in England.<sup>e</sup> It has been held that the payee of a bill drawn for his accommodation, who indorsed it to the plaintiff, was competent, in an action against the drawer, to prove that he indorsed it for a valuable consideration; for he would be liable to the unsuccessful party for the amount of the bill, and his liability to the one cannot exceed the extent of his liability to the other.<sup>f</sup> In an action against an indorser of a bill, a prior indorser, for whose accommodation the bill was indorsed by the defendant, having committed an act of bankruptcy and received his certificate, he was held a competent witness for the defendant, as the amount of the bill and the costs of the action were provable under the commission.<sup>g</sup> In an action by an indorser against a drawer, where it appeared that the bill was accepted in discharge of part of a debt due from the acceptor to the \*drawer; and afterwards indorsed to the acceptor, in order that he might get it discounted; and the acceptor delivered it to the plaintiff, upon condition that if he procured cash for it, he might retain out of it the amount of a debt due from him to the acceptor but he never did get cash for it; held, that the acceptor was not a competent witness to prove these facts; for though he was indifferent as to the amount sought to be recovered, being liable for it to the unsuccessful party, yet if the plaintiff obtained a verdict, the acceptor would be liable to the defendant for the costs, independently of the amount of the bill.<sup>h</sup>

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The declarations or admissions of a former holder of a bill or note, are not admissible in evidence unless they were contemporaneous with the making of the instrument, and formed part of the *res gesta*, or unless the party making such declarations is identified with the plaintiff in interest. As where in an action by an indorsee against the maker of a promissory

Declarations or admissions of a party.

<sup>a</sup> Staples v. Okines, 1 Esp. 332.

<sup>b</sup> Richardson v. Allan, 2 Stark. 334. (3 Eng. C. L. 371.)

<sup>c</sup> Stevens v. Lynch, 2 Camp. 332.

<sup>d</sup> Charrington v. Milner, Peake, 6.

<sup>e</sup> Jordaine v. Lashbrooke, 7 T. R. 601.

<sup>f</sup> Shuttleworth v. Stevens, 1 Camp. 407. *Quære*, would he not be liable to the costs incurred by the drawer in this action? See Jones v. Brooke, *ante*, 501.

<sup>g</sup> Basset v. Dodgin, 9 Bing. 653. (23 Eng. C. L. 409.)

<sup>h</sup> Edmonds v. Lowe, 8 B. & C. 407. (15 Eng. C. L. 250.) But see Faith v. M'Intyre, *ante*, 501.

note, the defence was usury; held, that letters written by the payee to the maker, at the time of making the note, were admissible in evidence to prove that the note was illegal in its creation, on account of usury.<sup>a</sup> But where in an action by an indorsee against the maker of a note, payable with interest *on demand*, the plaintiff proved that he gave value for it, and the defendant tendered evidence of declarations made by the payee, while the note was in his possession, that he gave no value for the note; held, that such evidence was inadmissible, as the plaintiff could not be identified in interest with the payee, and the note could not be considered as having been indorsed after it was due.<sup>b</sup> So, in an action by the indorsee against the maker of a note, it was held that declarations of the payee not uttered at the time of making the note, were not admissible to prove that the consideration was money lost at play, unless it was previously shown that the indorsee was identified in interest with the payee, or that the note had been indorsed after it became due, <sup>\*504</sup> for the payee might be called.<sup>c</sup> But if it be shown that the plaintiff was suing for the benefit of a third person, what that person said is evidence.<sup>d</sup>

A declaration of a former holder, under whose indorsement the plaintiff claims, "that after the bill was due, the amount was settled between him and the acceptor," is not evidence for the acceptor, for the former holder may be called.<sup>e</sup>

## SECTION XVIII.

### INTEREST.

**Interest is recoverable from the time that the bill or note becomes payable.** THE general rule at common law is, that interest is not due on money or a debt, even if secured by a written instrument, in the absence of an express stipulation to that effect, or unless it be implied from the usage of trade, as in the case of mercantile instruments.<sup>f</sup> In the case of a bill or note, interest is in general recoverable from the time it becomes payable, if it contains no provision for the payment of interest. If a bill or note be

<sup>a</sup> Kent v. Lowen, 1 Camp. 177.

<sup>b</sup> Barough v. White, 4 B. & C. 325. (10 Eng. C. L. 345.) 6 D. & R. 379.

<sup>c</sup> Beauchamp v. Parry, 1 B. & Ad. 89. (20 Eng. C. L. 351.)

<sup>d</sup> Welstead v. Levy, 2 M. & M. 138.

<sup>e</sup> Duckham v. Wallis, 5 Esp. 251. Pocock v. Billing, 2 Bing. 269. (9 Eng. C. L. 409.) Colenridge v. Farquharson, 1 Stark. 259. (2 Eng. C. L. 381.)

<sup>f</sup> Page v. Newman, 9 B. & C. 378. (17 Eng. C. L. 399.) Foster v. Weston, 6 Bing. 709. (19 Eng. C. L. 211.) But by 3 & 4 W. IV, c. 24, interest is recoverable on all debts payable by virtue of a written instrument at a certain time; or if payable otherwise, then from the time that a demand of payment shall have been made in writing, provided such demand shall give notice to the debtor that interest shall be claimed from that period until the debt be paid.

payable on presentment or on demand, interest is recoverable from the time of presentment or demand only,<sup>a</sup> and the issuing of a writ of summons is a sufficient demand.<sup>b</sup> But where a note is made payable on demand or four months after date, *with lawful interest*, it carries interest from the *date*.<sup>c</sup> The drawer or indorser of a bill, or indorser of a \*note, is only liable to pay interest from the time he receives notice of the dishonor.<sup>d</sup> \*505

Interest is to be computed from the time that it becomes payable until the time when the demand is completely liquidated by final judgment being signed, by which means the temptation to a defendant to make use of all the unjust dilatoriness of chicane is taken away; for if interest were to stop at the commencement of the suit, (as was formerly the practice,) where the sum was large, the defendant might gain by protracting the cause in the most expensive and vexatious manner.<sup>e</sup> But interest beyond the period of final judgment, has been refused, even in a case of great hardship.<sup>f</sup>

In trover for bills of exchange or promissory notes, interest is only to be calculated down to the time of conversion.<sup>g</sup> Interest ceases to run after a tender has been made.<sup>h</sup>

The rate of interest allowed in this country is 5% per cent., but when a higher rate of interest is allowed in a foreign country it may be recovered here. In Ireland it is six per cent., and in India it is not always limited to twelve per cent.<sup>i</sup> The jury may allow what interest they deem reasonable not exceeding five per cent., in the nature of damages, where interest is not reserved on the face of the instrument, or they may refuse to allow any interest if it appears to be the plaintiff's own fault that he has not recovered the principal before.<sup>j</sup> If the principal has been paid, the plaintiff may still proceed for interest, and the jury are bound to give it, unless the charge has been incurred by the negligence of the plaintiff.<sup>k</sup> Where

What rate  
of interest  
is allowed

<sup>a</sup> *Blaney v. Bradley*, Bl. 761. *Cotten v. Horsemanden*, Bayley, 349. *Pierce v. Fothergill*, 1 Hod. 251. <sup>2</sup> *Bing. N. C.* 167. (29 Eng. C. L. 296.) *Weston v. Tomlinson*, Chitty, 664.

<sup>b</sup> *Id.*

<sup>c</sup> *Kennerly v. Nash*, 1 Stark. 452. (2 Eng. C. L. 466.) *Hopper v. Richmond*, 1 Stark. 507. (2 Eng. C. L. 488.) *Doman v. Dibdin*, 1 R. & M. 38. (21 Eng. C. L. 465.) Bayley, 349.

<sup>d</sup> *Walker v. Barnes*, 5 Taunt. 240. (1 Eng. C. L. 91.)

<sup>e</sup> Per Lord Mansfield, in *Robinson v. Bland*, 2 Burr. 1085.

<sup>f</sup> *Jarold v. Rowe*, 8 Taunt. 582.

<sup>g</sup> *Mercer v. Jones*, 3 Camp. 477. This decision was founded on a rule that the plaintiff was only entitled to damages equal to the value of the article converted at the time of the conversion; but now, by 3 & 4 W. IV, c. 42, the jury may give damages over and above the value of the goods at the time of the conversion.

<sup>h</sup> *Dent v. Dun*, 3 Camp. 296.

<sup>i</sup> *Upton v. Lord Ferrers*, 5 Ves. 803. *Anon.* in the House of Lords, 3 Bing. 193. (11 Eng. C. L. 93.) Chitty, 666. *Harvey v. Archbold*, 3 B. & C. 626. (10 Eng. C. L. 203.)

<sup>j</sup> *Cameron v. Smith*, 2 B. & A. 308. *Du Bellois v. Waterpark*, (Lord,) 1 D. & R. 16. (16 Eng. C. L. 12.)

<sup>k</sup> *Laing v. Stone*, M. & M. 229, n. (22 Eng. C. L. 299.)



- money is paid into court on a security bearing interest, interest  
\*506 \*must be paid to the time of payment into court, or the plaintiff may proceed in the action for the difference.<sup>a</sup> A banker, in charging interest to a customer who has overdrawn his account, should compute it, not from the date, but from the payment of the customer's checks.<sup>b</sup>
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<sup>a</sup> *Kidd v. Walker*, 2 B. & Ad. 705. (92 Eng. C. L. 174.)

<sup>b</sup> *Goodbody v. Foster*, Byles, 233.

\*CHAPTER V.

CARRIERS.

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SECTION I.

WHO ARE COMMON CARRIERS.

A common carrier is a person who undertakes to carry the goods of all persons indifferently for hire.<sup>a</sup> Such as the mail-coach contractors, the proprietors of stage-coaches and wagons;<sup>b</sup> the owners and masters of ships and steam-boats, engaged in the transportation of goods generally for hire: lightermen, hoymen, ferrymen, barge-owners and wharfingers.<sup>c</sup>(1)



SECTION II.

THE DUTIES AND RESPONSIBILITY OF A CARRIER AT COMMON LAW.

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1.—*By land.*] It is the duty of a common carrier to receive and carry all goods that are offered to him for conveyance; Duties of carriers by land.

<sup>a</sup> 1 Salk. 249.  
<sup>b</sup> Bac. Abrid. Tit. "Carriers," A. Lovett v. Hobbs, 2 Show. 127. Clarke v. Gray, 4 Esp. 177. Brooke v. Pickwick, 4 Bing. 218. (13 Eng. C. L. 404.)  
<sup>c</sup> Bac. Abrid. "Carriers," A. Morse v. Slew, 1 Mod. 85. 2 Lev. 69. Rich v. Kneeland, Cro. Jac. 330. Maving v. Todd, 1 Stark. 72. (2 Eng. C. L. 301.) S. N. P. 396.

(1) (It is not every person who undertakes to carry goods for hire that is a common carrier. A private person may contract with another for the carriage of his goods, and incur no

\*508 and if he refuses to carry goods without a sufficient excuse, upon being tendered \*a reasonable compensation, he is liable to an action.<sup>a</sup> It has been laid down, that where a carrier has convenience to carry goods, he cannot refuse to take the goods of any particular person, and possibly an action might lie against him if he refused to take such goods without a sufficient reason for the refusal. It would, however, be a reasonable excuse for not carrying goods of great value, either if it appear that the carrier did not hold himself out as a person ready to convey all sorts of goods, or that he had no convenient means of conveying with security such articles;<sup>b</sup> and it seems that it would be a reasonable ground for refusing to take goods, that they are of such a nature as would expose them at the time to extraordinary danger, or to popular rage, such as exporting corn in times of scarcity;<sup>c</sup> a carrier may refuse to take goods into his ware-house before he is ready to take his journey.<sup>d</sup>

Responsi-  
bility of a  
common  
carrier.

Relieved  
by the act  
of God and  
the king's  
enemies.

A carrier is, by the common law of the realm, in the nature of an insurer and he is not discharged in case of any loss or injury to the goods, unless it was occasioned by the act of God or of the king's enemies.<sup>e</sup> To give due security to property, the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care, the responsibility of an insurer. From his liability of an insurer, a carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, "the act of God and the king's enemies."<sup>f</sup>(1)

The expression, "act of God," denotes natural accidents,

<sup>a</sup> Bac. Abrid. "Carriers," B. Jackson v. Rogers, 2 Show. 327. Boulston v. Sandiford, Skin. 279. 1 Saund. 312. Riley v. Horne, 5 Bing. 217. (15 Eng. C. L. 422.) Per Lord Ellenborough, C. J., 6 East, 522.

<sup>b</sup> Per Holroyd, J., in Batson v. Donovan, 4 B. & A. 32. (6 Eng. C. L. 337.)

<sup>c</sup> Edwards v. Sherratt, 1 East, 604.

<sup>d</sup> Lord Raymond, 652. "The undertaking of carriers, is to deliver the parcel to whomsoever it be directed, and the fact of there being a series of agents by whom a duty is to be performed in conveying such parcel to the carrier, does not alter his responsibility in consequence of a breach of his contract, if the parcel be lost after delivery to him." Per Lord Denman, C. J., in Syms v. Chaplin, 1 Nev. & Per. 134, post, 527.

<sup>e</sup> Jones on Bailments, 104. B. N. P. 70.

<sup>f</sup> Per Best, C. J., in Riley v. Horne, 5 Bing. 220. (15 Eng. C. L. 424.) 2 M. & P. 333.

responsibility beyond that of any ordinary bailer for hire, that is to say, the responsibility of ordinary diligence. It is the holding themselves out, as ready to engage in the transportation of goods for hire as a business, and not as a mere occupation *pro hac vice* that constitutes common carriers. *Beckman v. Shouse*, 5 Rawle, 179. *Satterlee v. Groat*, 1 Wend. 272. As to who are common carriers, see also *Spencer v. Dagget*, 2 Verm. 92. *Harrington v. M'Shane*, 2 Watts, 443. *Allen v. Sewall*, 2 Wend. 327. S. C. 6 Wend. 335. *Hastings v. Pepper*, 11 Pick. 41.)

(1) (*Hastings v. Pepper*, 11 Pick. 41. *Spencer v. Dagget*, 2 Vermont, 92. *Harrington v. M'Shane*, 2 Watts, 443.)

\*such as lightning, earthquakes and tempests, and, it is said, all accidents and misfortunes arising from inevitable necessity. By "the king's enemies," is to be understood enemies at open war, and not merely robbers, thieves, or other private depredators; but pirates on the high seas, being the common enemies of mankind, are deemed the king's enemies, and therefore a carrier is not liable for losses occasioned by them.<sup>a</sup>

Where a hoy containing goods was sunk *by a sudden gust of wind* as it was passing through a bridge, and the goods were spoiled; held, that the owner, who was a common carrier, was not liable for the loss, as it was occasioned by the act of God. For though he ought not to have ventured to shoot the bridge, if the general bent of the weather had been tempestuous, yet this being only a sudden gust of wind had entirely varied the case.<sup>b</sup>

But a carrier is liable though robbed,<sup>c</sup> or for a loss occasioned by an accidental fire, while the goods are in his possession. As where a fire broke out accidentally, in a booth at the distance of 100 yards from the place where a carrier had deposited the goods to be ready for carriage; he was held liable, though the jury acquitted him of negligence.<sup>d</sup> So, where goods had been carried from *A.* to *B.*, where the owner lived, and were accidentally burned in a warehouse there, before they had been carted to the plaintiff's house; the carriers were held to be liable, though the warehouses did not belong to them, and although they allowed the profits of the cartage which they received to another person.<sup>e</sup>(1)

Liable even in case of robbery or accidental fire.

\*Where a common carrier received on board his barge a quantity of lime to be conveyed from Bewley Cliff to London; the master deviated from the usual and customary voyage

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<sup>a</sup> Jones on Bail. 104, 5 *id.* App. ii. "I consider the act of God to mean something in opposition to the act of man, or such an act as could not happen by the intervention of man, such as storms, lightning and tempests." Per Lord Mansfield, C. J., in *Forward v. Pittard*, 1 T. R. 33.

<sup>b</sup> Amies v. Stephens, Stra. 128.

<sup>c</sup> Jones on Bail. 103. 1 Inst. 89, *a.* If an armed force come to rob the carrier of the goods, he is liable; and the reason is, for fear it may give room for collusion that the master may contrive to be robbed on purpose, and share the spoil. Per Lord Mansfield, 1 T. R. 34. 3 Esp. 131.

<sup>d</sup> *Forward v. Pittard*, 1 T. R. 27.

<sup>e</sup> *Hyde v. The Trent Navigation Company*, 5 T. R. 389. But if the goods be not in the custody of the carrier, he is not liable. As where goods were carried from *A.* to *B.* and there deposited in a warehouse, for the convenience of the owner, until they could be forwarded by another conveyance, and were consumed by fire; it was held that the carrier was not liable, the owner not having paid him any thing for warehouse room. *Garside v. The Trent Navigation Company*, 4 T. R. 581.

(1) (In Scotland, France, Spain, Holland, Italy and Louisiana the somewhat milder features of the civil law form the basis of the liability of carriers by land and water. 11 Martin's Rep. 314. 10 Johns. 9. Code Napoleon, Art. 1782, 1784, 1952 and 1953. Even by their laws *culpa levissima*, or the slightest fault on the part of the carrier or his servant, makes him liable for the loss or injury, but not those accidents which the greatest care could not have prevented. See *Sewall v. Allen*, 6 Wend. 349.)

without any justifiable cause, and whilst the barge was out of her course, she encountered the storm, and the sea communicating with the lime, caused it to ignite, whereby the barge and cargo were lost; in an action on the case for the loss of the lime, the declaration alleged, that it was the duty of the defendant to have carried the lime by and according to the customary way, without any voluntary and unnecessary deviation from the same; and averred the loss to be by reason of the deviation from the usual course. Held, that the damage sustained by the plaintiff was sufficiently proximate to the wrongful act of the defendant to form the subject of an action and that the declaration was sufficient to support a judgment for the plaintiff.<sup>a</sup>

A person who undertakes to carry goods safely will be responsible for the loss, though the owner sends his servant along with him to guard the goods, and although he is not a common carrier, for by his special undertaking to carry the goods safely, he puts himself in the situation of a common carrier.<sup>b</sup>

Owners of stage-coaches are responsible for the goods of passengers.  
\*511

It has been determined that if a man travel in a stage-coach and take his portmanteau with him, though he has his eye on the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost.<sup>c</sup>(1) And it is no defence that the damage or loss has been occasioned by the \*wrongful act or negligence of a third person;<sup>d</sup> or that goods were wrongfully seized by the officers of government, so that they could not be delivered to the consignee; for the carrier has his remedy against the officers.<sup>e</sup> This is a rule of policy and convenience in order to make carriers more careful; for if a carrier were to be excused where the damage was occasioned by the misconduct or negligence of strangers, when he found that to be the case he would give himself no more trouble about the goods.<sup>f</sup>

If a box of clothes packed by the owner be sent by a carrier, and lost, the judge will recommend the jury to give what they consider the fair value of it, in damages, though there be no evidence of the particular articles which the box contained.<sup>g</sup> Where a greyhound was delivered to a carrier, who lost it, held, that it was no defence to an action against him, that the

<sup>a</sup> *Davis v. Garrett*, 4 M. & P. 540. 6 Bing. 716. (19 Eng. C. L. 212.)

<sup>b</sup> *Robinson v. Dunmore*, 2 B. & P. 416. But in the case of the *East India Company v. Pullen*, Stra. 690, it was held that a lighterman employed by the plaintiff to convey goods from the river to their warehouse, was not liable for goods lost, because an officer belonging to the plaintiff took charge of the goods in the lighter, and the defendant never was entrusted with the goods at all.

<sup>c</sup> Per Chambre, J., *id.* 419. *Butler v. Bassing*, 2 C. & P. 613. (12 Eng. C. L. 287.) *Brooke v. Pickwick*, 4 Bing. 218. (13 Eng. C. L. 404.)

<sup>d</sup> Per Ashhurst, J., 3 Esp. 136.

<sup>e</sup> *Gosling v. Higgins*, 1 Camp. 451.

<sup>f</sup> 2 Stark. Ev. 202.

<sup>g</sup> *Butler v. Basing*, 2 C. & P. 613. (12 Eng. C. L. 287.)

(1) (*Orange County Bank v. Brown*, 9 Wend. 85.)

dog was not properly secured when delivered to him, there being no collar about his neck, but a cord; for after a complete delivery he was bound to use proper means of securing him.<sup>a</sup> If the owner of the goods gives directions to the carrier and the latter assents to deal with the goods according to such directions, the law implies a promise by him to deliver the goods as directed.<sup>b</sup>

2.—*Duties of carriers by water.*] In every contract for the carriage of goods by water, it is a term of the contract on the part of the carrier, implied by law, to provide a vessel tight, staunch and strong, and suitably equipped for the voyage, with proper officers, and a proper crew, to guard against all injuries incident to the property, to use due diligence in preserving the goods from the effects of storms, bad air, leakage, and embezzlements.<sup>c</sup>(1) Where a carrier by water gave notice that he would not be answerable for any damage, unless occasioned by want of ordinary care in the \*master or crew of the vessel; held, that a loss happening by leakage, was not within the scope of such notice, as it proceeded from the personal default of the carrier himself in not providing a sufficient vessel, as he impliedly engaged that his vessel was tight and fit for the purpose.<sup>d</sup> So, where the owner of a vessel gave notice that he would not be answerable for any loss, except it was occasioned by want of care in the master, unless extra freight was paid, and he took on board goods to be carried from *A.* to *B.*, (an intermediate place between *A.* and *C.*), and the vessel passed by *B.* without delivering the goods there, and sank before her arrival at *C.*; held, that the carrier was liable, for he ought to have delivered the goods at *B.*<sup>e</sup>

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It has been held to be no defence to an action for the loss of goods by leakage, that the ship was tight when the goods were put on board, but that a rat by gnawing out the oakum had made a small hole through which the water gushed; for, as Chief Justice Lee, said, "the carrier is answerable for goods and in *all events* except they happen to be damaged by the act of God or the king's enemies."<sup>f</sup> So, where a vessel drove

<sup>a</sup> *Stuart v. Crawley*, 2 Stark. 323. (3 Eng. C. L. 365.)

<sup>b</sup> *Streeter v. Horlock*, 1 Bing. 34. (8 Eng. C. L. 233.) 7 Moore, 283.

<sup>c</sup> *Abbott on Shipping*, B. 3, ch. 3, s. 1 to 12.

<sup>d</sup> *Lyon v. Mells*, 5 East, 428.

<sup>e</sup> *Ellis v. Turner*, 8 T. R. 531. See also *Davis v. Garrett*, *ante*, 510.

<sup>f</sup> *Dale v. Hall*, 1 Wils. 231. Sir Wm. Jones in his treatise on bailments, in allusion to this case, says, "the true reason of this decision is not mentioned by the re-

(1) (It is decided in *Hart v. Allen*, 2 Watts, 114, that it must appear that the defect or want of care occasioned the loss, to enable a plaintiff to recover against the carrier. "A carrier," says C. J. Gibson, "is answerable for the consequences of negligence, not the abstract existence of it. Where the goods have arrived safe, no action lies against him for an intervening but inconsequential act of carelessness; nor can it be set up as a defence against payment of the freight, and for this plain reason, that the risk from it was all his own.")



against an anchor in a river and sank, the carriers were held liable for the loss of the goods on board, though the accident was occasioned by the negligence of other persons, who had not put a buoy out to mark the place where the anchor lay.\*

### SECTION III.

#### THE COMMENCEMENT AND TERMINATION OF THEIR RISK.

Com-  
mence-  
ment of  
the risk.  
\*513

THE carrier's responsibility does not commence until there has been an actual or constructive delivery of the goods to him; \*a delivery to an authorised agent is a delivery to the principal; a delivery to the driver of a stage-coach is a delivery to the proprietors;<sup>b</sup> unless it appears that such delivery was for the benefit of the driver.<sup>c</sup> A delivery at any office, warehouse, or receiving-house, which has been used or appropriated by any mail contractor, or stage-coach proprietor, or other common carrier by land, shall be deemed a delivery to such carrier, &c.<sup>d</sup> But a delivery of goods on board a ship should be to some officer accredited for that purpose, as to the mate.<sup>e</sup> Where goods were delivered at a wharf to an unknown person there, and no knowledge of the fact was brought home to the wharfinger or his agents; it was held, not sufficient to charge the wharfinger.<sup>f</sup>

Termina-  
tion of the  
risk.

The responsibility of the carrier, which we have seen commences with an actual or constructive receipt of the goods, continues while the goods remain under his control, or while either by custom or his contract as a carrier any further duty remains to be performed by him in respect of them. His responsibility ceases when the goods have reached their place of destination, or when the owner by any act or direction has waived a delivery at such place.<sup>g</sup>(1)

porter; it was in fact *at least ordinary negligence* to let a rat do such mischief in the vessel." P. 105.

\* The Trent Navigation Company v. Wood, 3 Esp. 127.

<sup>b</sup> Williams v. Cranston, 2 Stark. 82. (3 Eng. C. L. 256.) Syms v. Chaplin, 1 N. & P. 129, *post*, 527.

<sup>c</sup> Butler v. Basing, 2 C. & P. 613. (12 Eng. C. L. 287.)

<sup>d</sup> 11 G. IV & 1 W. IV, c. 68, s. 5 Syms v. Chaplin, 1 N. & P. 129, *post*, 527. If a carrier directs goods to be sent to a particular booking office, he is answerable for the negligence of the office keeper. Colepepper v. Good, 5 C. & P. 380. (24 Eng. C. L. 370.)

<sup>e</sup> Cobban v. Downe, 5 Esp. 43.

<sup>f</sup> Buckman v. Levi, 3 Camp. 414.

<sup>g</sup> Jones on Bailments, 97, n. 4th Ed. *Id.* App. xviii. Abbott on Ship. b. 3, c. 3, s. 12.

(1) (In respect to the time of delivery, the carrier is responsible only for due diligence, and may excuse delay by accident or misfortune, although not inevitable. *Parsons v. Hardy*, 14 Wend. 215. If in unloading he makes use of the machinery of another, which breaks, he is responsible. *De Mott v. Laraway*, 14 Wend. 225.)

It has never been formally decided whether a carrier is bound in all cases, to deliver goods at the *residence* of the consignee. The question was discussed in the case of *Hyde v. the Trent Navigation Company*,<sup>a</sup> where Ashhurst, Buller, and Grose, Js., (contrary to the opinion of Lord Kenyon,) considered that he was; but the special circumstances of the case rendered it unnecessary for them to decide the general question. But they all agreed that the owners of a ship exporting goods from a foreign country is discharged from all liability by "landing the goods at the usual wharf."<sup>b</sup> The tendency however of recent decisions is (in the absence of any custom or contract to the contrary) in favor of the doctrine laid down by the three judges above alluded to. "It is the duty of the carrier," said Mr. Justice Bayley, "to take the goods to the house of the person for whom they were intended, if he found the person to whom they were directed, or to keep them in order to make due inquiry to find him out."<sup>c</sup> "But it is the duty of all carriers to give notice of the arrival of the goods to the consignee, whether bound to deliver them or not."<sup>d</sup>

Delivery  
of the  
goods.

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Where a parcel was directed to J. Worthy, Exeter, and the carrier delivered it to one who told him he had been sent for it by a person whom he did not know, but who was in the street; it was held, that the carrier was guilty of negligence and liable to the owner.<sup>e</sup> So, where a parcel of goods was directed "To Mr. James Parker, of High Street, Oxford," who, on being applied to, said that he expected no such parcel, and it was afterwards delivered to a person who called at the carrier's office claiming it as his, and paid the carriage; held, that the carrier was liable to the real owner.<sup>f</sup> So, where a carrier inquired respecting the consignee, at the place to which the goods were directed, and could get no information respecting him, but he received two letters ordering the goods to be sent elsewhere; which he did accordingly. The transaction turned out to be a fraud on the consignor by some persons unknown; held, that the carrier was liable in trover to the consignor for his negligence, and that it was a proper question for the jury to say, whether the defendant had delivered the parcel according to the due course of business.<sup>g</sup> If a carrier by mistake delivers to *B.* goods consigned to *C.*, and *B.* appropriate the goods, and the carrier pays the value to *C.*, he may recover it

<sup>a</sup> 5 T. R. 396.

<sup>b</sup> For such goods are brought under a bill of lading, which is merely an undertaking to carry them from port to port. A ship trading from one port to another, has no means of carrying goods on land. Per Buller, J., *id.* *Stoer v. Crowley*, M'Clel. & Y. 129.

<sup>c</sup> *Garnett v. Willan*, 5 B. & A. 53. (7 Eng. C. L. 19.) *Bodenham v. Bennett*, 4 Price, 31.

<sup>d</sup> Per Gould, J., in *Golden v. Manning*, 2 Bl. 916.

<sup>e</sup> *Birkett v. Willan*, 2 B. & A. 356.

<sup>f</sup> *Duff v. Budd*, 3 B. & B. 177. (7 Eng. C. L. 399.)

<sup>g</sup> *Stephenson v. Hart*, 4 Bing. 476. (15 Eng. C. L. 47.)

\*again from *B.* as money paid to *B.*'s use, but not as the price of goods sold and delivered to *B.*<sup>a</sup>

If it be the general course of trade to deliver goods at the houses to which they are directed, it is the duty of the carrier to do so, and he is liable for any loss that may occur until such delivery is made.<sup>b</sup> But if the owner of the goods has done any act to waive or suspend the delivery of them, the carrier is thereby discharged. As if the owner agrees that after the arrival of the goods the carrier shall let them remain in his warehouse until the owner can conveniently send for them, and while there deposited they are destroyed by fire, the carrier is not responsible in that character.<sup>c</sup>

#### SECTION IV.

##### LIABILITY OF CARRIERS BY WATER.—STATUTES RELATING TO.

THE common law liability of carriers may be limited by special contract.<sup>(1)</sup> Thus the owners of ships limit their liability by an exception of certain risks specified in the bill of lading; and carriers by water in general issue notices specifying the conditions on which they will be responsible for the loss or damage of goods, and so did carriers by land, until the passing of a recent act which shall be hereafter noticed; and the conditions contained in those notices have been held to be binding on all persons who, with a full knowledge thereof, deliver goods to be carried. The liability of carriers by water has also been restricted by several statutory provisions.

Owners of ships not liable beyond the value of the vessel By the 7 Geo. II, c. 15, s. 1, after reciting the liability of the owners of vessels, for goods made away with by the master and mariners without the knowledge or privity of the owners, to the prejudice of trade and navigation, it is enacted, "that the owners of vessels shall not be liable for any loss or damage

\*516 by \*reason of any embezzlement, secreting, or making away

<sup>a</sup> *Brown v. Hodgson*, 4 Taunt. 189.

<sup>b</sup> *Golden v. Manning*, 2 Bl. 916. *Hyde v. Trent Navigation Company*, 5 T. R. 389. *Catley v. Wintringham*, Peake, 150. *Wardell v. Mourillyan*, 2 Esp. 693.

<sup>c</sup> In *re Webb*, 8 Taunt. 443. (4 Eng. C. L. 159.) 2 Moor. 500. *Garside v. Trent Navigation Company*, 4 T. R. 581, *ante*.

(1) (*Hastings v. Pepper*, 11 Pick. 41. It was formerly a question of much doubt how far common carriers on land could, by contract, limit their responsibility. But that they have the power seems now to be settled, although many learned judges have expressed some regret that the validity of notices restricting their liability was ever recognised. But although this must now be admitted, yet they cannot by any special notice or agreement free themselves from all responsibility, particularly where there is gross negligence or fraud, nor from the exercise of ordinary care. *Beckman v. Shouse*, 5 Rawle, 179. The terms of the notice should be clear and explicit and not liable to the charge of ambiguity or doubt. *Ibid. Camden Co. v. Burke*, 13 Wend. 628.)

with (by the master or mariners) of any goods shipped on board any vessel, or for any damage done by the master or mariners, without the privity and knowledge of the owners, *further than the value of the vessel, with her appurtenances, and freight for the voyage.*" It was decided, that a robbery committed by fresh water pirates, on board a vessel in the Thames, to which one of the mariners of the vessel was accessory, came within the provisions of this act, and that the owner of the vessel was not liable for the goods stolen beyond the value of the vessel and freight.\*

The preceding enactment not having afforded adequate protection to the owners of vessels, to remedy the defect, the 26 Geo. III, c. 86, after reciting that the above provision was confined to the single case of a loss happening with the privity, or through the fault of the master or mariners, &c., section 2, exempts the owners of vessels from responsibility in cases of loss or damage by fire; and by sec. 3, they are exempted from all liability for any loss happening to gold, silver, diamonds, watches, jewels, or precious stones, by reason of any robbery, embezzlement, &c., unless the owner insert in his bill of lading, or otherwise declare in writing to the master or owner of the vessel, the nature, quantity, and value of such gold, &c. As the 7 Geo. II, c. 15, limited the responsibility of the owner only where the loss happened through *the fault of the master or mariners*, it was further provided by the 53 Geo. III, c. 159, s. 1, that the owners shall not be charged with *any loss arising from any act*, neglect, matter or thing done, omitted, or occasioned without their fault or privity, further than the value of the ship, &c.

for loss occasioned by master or mariners.  
  
Not liable for loss by fire;  
Nor for jewelry unless the nature and value be declared.

For an exposition of these statutes, the reader is referred to the cases of *Wilson v. Dickson*, 2 B. & A. 2; and *Gale v. Laurie*, 5 B. & C. 156. (2 C. L. 187.)

\*SECTION V.

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LIABILITY OF CARRIERS BY LAND.

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1.—*The Carriers' Act.*] HERETOFORE it was the universal practice among carriers by land, to issue notices restrictive of their common law liability. The tenor of such notices was that they would not be responsible for goods of a particular

\* *Sutton v. Mitchell*, 1 T. R. 19.

description delivered to them, or for any goods above a certain value, (generally 5*l.*.) unless they were informed of their value, or in the words of the notice, "unless they were entered as such and paid for accordingly," but these notices were found to be inefficacious and productive of much litigation; for when a carrier was sued for the loss of goods, in order to avail himself of his notice, it was incumbent on him to fix the plaintiff with a *full knowledge* of its existence; (for such notices were obligatory on those only who had knowledge of their contents;) and the proof of such knowledge was in general attended with much difficulty and inconvenience, to remedy which, the following act was passed:—

11 Geo. IV & 1 Will. IV, c. 68.—*An Act for the more effectual protection of mail-coach contractors, stage-coach proprietors, and other common carriers for hire, against the loss of, or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof.*

I. Whereas, by reason of the frequent practice of bankers and others sending by the public mails, stage-coaches, waggon, vans, and other public conveyances by land for hire, parcels and packages containing money, bills, notes, jewelry, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire is greatly increased: And whereas, through the frequent omission by persons sending such parcels and packages to notify the value and contents thereof, so as to enable such mail contractors, stage-coach proprietors, and other

\*518 \*common carriers, by due diligence to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with the knowledge of notices published by such mail contractors, stage-coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, that from and after the passing of this act, no mail contractors, stage-coach proprietors, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following; that is to say, gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewelry, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the Governor and Company of the banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, and securities for payment of money,

No common carrier by land shall be liable for the loss of a parcel exceeding the value of 10*l.* unless the nature

English or foreign; stamps, maps, writings, title-deeds, paintings, engravings, gold or silver plate, or plated goods, glass, china, silk in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs or lace, or any of them, contained in the parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such article or articles, or property aforesaid contained in such parcel or package, shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail contractor, stage-coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased \*charge as hereinafter mentioned, or an engagement to pay the same be accepted by the person receiving such parcel or package.

thereof be declared, and an increased charge be paid by the person sending the same.

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II. And be it further enacted, that when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed ten pounds, it shall be lawful for such mail contractors, coach proprietors, and other common carriers, to demand and receive an increased charge to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving-house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charges required to be made over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles, and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office, shall be bound by such notice, without further proof of the same having come to their knowledge.

Notice to be affixed in the office or receiving-house stating the increased rates of charges.

III. Provided always, and be it further enacted, that, when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the person receiving such increased rate of charge, or accepting such agreement, shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and, if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage-coach proprietor, or other common carrier as aforesaid, shall not have or be entitled to any benefit or advantage under this act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate or charge.

If such notice be not affixed in the office, or if the carrier refuses to give a receipt of the parcel having been insured, he shall not be entitled to any benefit under this act.



Public notice limiting liability of the carrier, not to avail.

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What shall be deemed an office or receiving-house.

Action not to abate for non-joinder of co-partner.

Not to affect special contract.

When a parcel is lost, the increased charge to be recovered in addition to the value.

\*521 Carriers to be liable for the felonious acts of their servants.

IV. Provided always, and be it further enacted, that from and after the first day of September now next ensuing, no public notice or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit, or in any way affect the liability at common law of any such mail contractors, stage-coach proprietors, and other common carriers as aforesaid, for or in respect of any articles or goods to be carried or conveyed by them, but that all and every such mail contractors, stage-coach proprietors, and other common carriers as aforesaid, shall, from and after the first day of September, be liable as at the common law, to answer for the loss of, or any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability notwithstanding.

V. And be it further enacted, that, for the purposes of this act, every office, ware-house, or receiving-house which shall be used or appropriated by any mail contractor, or stage-coach proprietor, or other such common carrier as aforesaid, for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the office, warehouse, or receiving-house of such mail contractor, stage-coach proprietor, or other common carrier; and that any one or more of such mail contractors, stage-coach proprietors, or common carriers, shall be liable to be sued in his, her, or their names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor, or copartner in such mail, stage-coach, or other public conveyance by land for hire as aforesaid.

VI. Provided always, and be it further enacted, that nothing in this act contained shall extend or be construed to annul or in any wise affect any special contract between such mail contractor, stage-coach proprietor, or common carrier, and any other parties, for the conveyance of goods and merchandises.

VII. Provided also, and be it further enacted, that where any parcel or package shall have been delivered at any such office, and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcels or packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage, shall also be entitled to recover back such increased charges so paid as aforesaid, in addition to the value of such parcel or package.

VIII. Provided also, and be it further enacted, that nothing in this act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, book-keeper, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct.

IX. Provided also, and be it further enacted, that such mail-coach contractors, stage-coach proprietors, or other common carriers for hire, shall not be concluded as to the value of any such parcel or package by the value so declared as aforesaid; but that he or they shall in all cases be entitled to require, from the party suing in respect of any loss or injury, proof of the actual value of the contents by the ordinary legal evidence; and that the mail-coach contractors, stage-coach proprietors, or other common carriers aforesaid, shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges as aforementioned.

Extent of the liability of the carrier.

X. And be it further enacted, that, in all actions to be brought against any such mail contractor, stage-coach proprietor, or other common carrier as aforesaid, for the loss or injury of any goods delivered to be carried; whether the value of such goods shall have been declared or not, it shall be lawful for the defendant or defendants to pay money into court in the same manner and with the same effect as money may be paid into court in any other action.

Payment of money into court.

XI. And be it further enacted, that this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by judges, justices, and others, without being specially pleaded.

It may be observed, 1st, that the provisions of this act are confined to carriers by land; 2dly, that they extend to all the articles enumerated in the first section, and to that description of articles only when they exceed the value of ten pounds; 3dly, that the carrier is not exempted from his common law liability, even in respect of such goods, unless he affixes a public notice in a conspicuous part of his receiving-office, stating the extra charges for carrying such articles, &c.; 4thly, \*that it is immaterial whether the owner of the goods has any knowledge of such notice or not, provided it be affixed in a conspicuous part of the office; 5thly, that unless the value and nature of the goods be made known to the carrier, and the owner pays or agrees to pay the increased charge, as set forth in the notice, the carrier is not responsible; 6thly, that as to every other description of goods not specifically mentioned in the first section, of whatever value, and as to the description of goods therein mentioned, when not exceeding the value of 10*l.*, the common law liability of the carrier continues, which liability the carrier cannot limit or qualify by any *public notice*, as he could have done previously to the passing of that act; 7thly, that a carrier is not thereby precluded from entering into a *special contract* with any party respecting the conveyance of goods, but a *public notice* shall under no circumstance be deemed a contract; 8thly, that the carrier is in *all cases* liable, where the loss arises from the felony of his servants; 9thly,

Carrier not entitled to the benefit of the act unless he has complied with its provisions  
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\* Boyce v. Chapman, 1 Hodges, 338. 2 Bing. N. C. 222. (29 Eng. C. L. 314.)

that the carrier is not liable for more than the *actual* damage occasioned by the loss of the goods, though it be less than the declared value; nor for more than the declared value, if it be less than the actual value.

Hat bodies are not within this act; But a looking-glass, of whatever dimensions, is.

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In the construction of this act it has been held, that hat bodies, which are made partly of the soft substance taken off the skin of rabbits, and partly from sheep's wool, do not come within the word furs.\* But it has been held to extend to all the articles enumerated in the first section, without reference to the dimensions or value, though the preamble contemplates only "articles of great value in small compass." As where a looking-glass of a considerable size, exceeding the value of 10*l.*, packed up in a case, was delivered at the defendant's wagon office in London, to be conveyed to "the Elms, near Lymington." A notice was fixed up in the office pursuant to section 2 of the above act, though the person who delivered the parcel did not see it. The words "plate glass, looking-glass, keep the edge upwards," were marked on the case, but no declaration was made of the nature or value of the parcel, nor were the increased charges mentioned in the notice paid. The parcel was conveyed from Lymington to the place of its ultimate destination on a brewer's truck, along a hard gravel road, (but was not placed thereon with the edge upwards,) that being the usual mode of conveying parcels in that part of the country; when the glass was unpacked it was found to be broken. In an action against the carrier for the value of the glass, the jury found a verdict for the plaintiff, and they further found that the glass was broken through the defendant's negligence alone. The learned judge reserved leave to move to enter a nonsuit. A rule nisi having been obtained to enter a nonsuit, on the grounds that as the nature and value of the parcel were not declared, nor the extra charges paid as required by the act, the defendant was not liable, as he had delivered the parcel by the ordinary mode of conveyance. In showing cause it was contended that the parcel did not come within the description of "articles of great value in small compass," which were mentioned in the preamble, reciting the particular mischief intended to be remedied; and secondly, that the defendant was guilty of gross negligence, and consequently not within the protection of the statute, the intention of which was merely to put carriers in the same situation, by affixing a notice in their offices, as they were before the act, in cases where actual notice had been given at the time of the delivery to the owner of the goods; that the defendant therefore still continued answerable for gross negligence, in the same manner as before the statute. But the court held, that the carrier was not responsible. Bayley, B., "We are all of opinion that a looking-glass of the dimensions in question is an article within the meaning of the act.

\* Mayhew v. Nelson, 6 C. & P. 58. (25 Eng. C. L. 281.)

In the first place, it falls within the express words of the first section, viz. as glass. If it was the intention of the legislature to confine the act to 'articles of great value, in small compass,' as set forth in the preamble, I should expect to find these words in the enacting clause; the word 'glass' is unqualified and unlimited, and I cannot see that we are justified in saying it applies to glass in small compass only, and not of every description. The object is that the party shall be put upon his guard, not only against theft, but against the ordinary accidents of the road; and as some articles, and amongst them glass, require peculiar care, it \*is provided that the carrier shall not be responsible unless the value and nature of such articles or property shall have been declared, and the increased charge or engagement to pay the same, have been accepted by the person receiving the parcel or package. Now it seems to me, that the object of the act is twofold—first, it is that the party receiving the article may be apprised of the nature of it, in order that he may give it the greater degree of protection; and, secondly, that as he incurs an additional danger and risk, he should have an increased compensation. By the terms of the act, the plaintiff was required to give specific notice that the package contained glass of the value he seeks to recover, and as he did not, the defendant was not responsible. As to the point in respect of gross negligence, I believe it will be found in the greater number of cases, where the responsibility was thrown on the carrier on account of 'gross negligence,' when but for that he would have been exempt, that the carrier was guilty of misfeasance. There is no question that the carrier would not have been justified in dashing the glass to the ground, because that would have been acting as a wrong doer. In one case the parcel was delivered to a wrong person,<sup>a</sup> in another it was carried beyond the place of delivery,<sup>b</sup> and in another a different mode of conveyance was substituted.<sup>c</sup> In *Smith v. Horne*,<sup>d</sup> the carrier's cart was left standing in the public street unprotected, whilst the porter went to deliver another parcel. In all these instances there was misfeasance. Here it seems to me there was no misfeasance or gross degree of negligence. The negligence complained of was the carrying of the glass along a hard smooth road on a truck. If the carrier had been apprised of the contents of the case, it might not have been so prudent a mode of conveyance; but it was the ordinary mode of carriage, and to induce him to exercise more than ordinary care and diligence he was entitled to notice." Vaughan, Baron, concurred; but, said he, "if gross negligence had

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<sup>a</sup> *Duff v. Budd*, 3 B. & B. 177. (7 Eng. C. L. 399.) 6 Moore, 469, *ante*, 514. *Birkett v. Willan*, *ante*, 514.

<sup>b</sup> *Ellis v. Turner*, 8 T. R. 531. *Davis v. Garrett*, *ante*, 510.

<sup>c</sup> *Nicholson v. Willan*, 5 East, 507. *Sleat v. Fagg*, 5 B. & A. 342. (7 Eng. C. L. 123.)

<sup>d</sup> 8 Taunt. 144. (4 Eng. C. L. 50.) 2 Moore, 18.

been made out it would \*be different, but that was not established here." Gurney, Baron, "I think the declaration of the nature and value a condition precedent."<sup>a</sup> The defence set up in this case, namely, that the value of the goods was not declared, must now be specially pleaded, it cannot be given in evidence under the general issue.<sup>b</sup>(1)

The protection of the statute does not extend to gross negligence.

2.—*Gross negligence.*] It was evidently the inclination of the court in the preceding case, that a carrier forfeits the protection of the statute by gross negligence; and is thereby remitted to his common law liability. Gross negligence is a question for the consideration of the jury.<sup>c</sup> It would seem from the observations of Mr. Baron Bayley,<sup>d</sup> that nothing less than a *misfeasance* on the part of the carrier would justify the jury in finding "gross negligence." Where a valuable parcel of bank notes sent by a stage-coach was lost, and it was proved that on the arrival of the coach the driver was in liquor, and that the bookkeeper who saw the entry of it in the way bill, thinking that the coachman (as was the custom) had the parcel about his person, did not ask him about it or look into the coach for it; held, to be a loss arising from gross negligence, which deprived the carrier of the benefit of his notice.<sup>e</sup> So, where a valuable parcel had been booked to go by the mail, and was accepted by the proprietor to be so carried, but it was sent by a different coach and lost; held, gross negligence.<sup>f</sup> Where a stage-wagon, having seven horses, had only one wagoner to attend it, it was held gross negligence.<sup>g</sup> Where a wagon was left during several hours in the night, standing in the road opposite to an inn where the wagoner stopped, without any person to watch it; held, gross negligence.<sup>h</sup> But where a coach was left at midnight in the middle of a wide street, with a porter \*who was ordered to watch it and a valuable parcel was stolen out of it; held, (Best J., *dissentiente*,)

<sup>a</sup> Owen v. Burnett, 3 C. & M. 353. 4 Tyr. 133.

<sup>b</sup> Syms v. Chaplin, 129. 1 Nev. & Perry, 129.

<sup>c</sup> Batson v. Donovan, 4 B. & A. 21, (6 Eng. C. L. 333,) *post*, 526. Duff v. Budd, 6 Moore, 469, *ante*, 524. Beckford v. Crutwell, 5 C. & P. 242. (24 Eng. C. L. 300.)

<sup>d</sup> In Owen v. Burnett, *supra*, and in Batson v. Donovan, 4 B. & A. 34. (6 Eng. C. L. 338.)

<sup>e</sup> Bodenham v. Bennett, 4 Price, 31.

<sup>f</sup> Sleat v. Fagg, 5 B. & A. 342. (7 Eng. C. L. 123.) Nicholson v. Willan, 5 East, 507.

<sup>g</sup> Beckford v. Crutwell, 5 C. & P. 242. (24 Eng. C. L. 300.)

<sup>h</sup> Langley v. Brown, 1 M. & P. 583.

(1) (If the contents and value of a package are improperly or fraudulently concealed from a carrier for the purpose of depriving him of a part of the compensation he would otherwise have claimed for the transportation and risk, he is not liable, if he uses the ordinary diligence, which a prudent man would exercise in the preservation of his own property of the same apparent value; but if no improper means are adopted to conceal the contents of the package or its value, the party delivering it to the carrier is not bound to inform of the contents or value, when no inquiries are made of him on the subject. *Sewall v. Allen*, 6 Wend. 349.)



not to be gross negligence; as the carrier was not guilty of *misfeasance*, and as the parcel was not entered and paid for in accordance with his notice, he was not liable.<sup>a</sup> Though the carrier is answerable in case the goods be stolen by his servants,<sup>b</sup> (the statute not extending its protection to such cases,) yet if the owner of the goods, by his own improper conduct, affords undue temptation and facility to the crime of the servant, he cannot maintain an action for the loss occasioned by his own misconduct. As where a parcel containing 600 sovereigns enclosed in six pounds of tea were sent by a coach and paid for as an ordinary parcel, the contents thereof not being made known to the proprietor, but from the mode in which the parcel was made up, a close observer might suspect the nature of it. The parcel was stolen by one of the porters of the coach, while it was standing in the street in a town in the course of its journey. Held, that the owner could not recover the value of it from the proprietors of the coach, as the loss was occasioned by the improper mode in which the parcel was committed to their care.<sup>c</sup>

The carrier not liable for goods lost through the improper conduct of the owner.

3.—*Receiving-house.*<sup>d</sup>] Where the plaintiff gave a parcel, directed to *F.* in London, to the carrier at *B.*, who drove between *B.* and *M.*, and the carrier booked it at *M.*, at an inn where the defendant's coach stopped to take in parcels, and received the carriage for it from the innkeeper, who was in the habit of booking parcels for the defendant's coach, and who booked the parcel in question to London, and delivered it to the defendant's coachman. Held, that the carrier at *B.* was the agent of the plaintiff for the purpose of delivering the parcel to the coach by which it was to go to London; that the innkeeper was the agent, and the inn a receiving-house for parcels for the defendant's coach, within the meaning of the 5th section of the preceding act, so as to render the defendants liable for the non-delivery of the parcel, though it appeared that the innkeeper was in the habit of receiving parcels for other coaches as well as the defendant's, and that he might exercise an option as to which coach he would send it by; for when he received a parcel to be conveyed by coach, and delivered it to a particular coach, he received it as agent for that coach; and it could make no difference whether the parcel was delivered to the innkeeper by the plaintiff himself, or by an agent on his behalf. When the parcel was taken in at the inn, the contract

Any house which is in the habit of booking parcels for any coach is a receiving-house, for such coach.

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<sup>a</sup> *Batson v. Donovan*, 4 B. & A. 21. (6 Eng. C. L. 333.) *Quære.* Whether the intrusting valuable property to a servant of whose character the carrier gave no account at the trial, was sufficient to justify the jury in finding the carrier guilty of gross negligence so as to deprive him of the advantages of his notice. *Macklin v. Waterhouse*, 5 Bing. 212. (15 Eng. C. L. 421.)

<sup>b</sup> *Boyce v. Chapman*, 1 Hodges, 338. 2 Bing. N. C. 222. (29 Eng. C. L. 314.) 2 Scott, 365.

<sup>c</sup> *Bradley v. Waterhouse*, M. & M. 154. 3 C. & P. 318. (14 Eng. C. L. 326.)

<sup>d</sup> See *ante*, 520, sec. 5, as to what shall be a receiving-house.



to convey safely to London, was made between the plaintiff and the defendants by their respective agents.<sup>a</sup>

A carrier without a reward is liable for the loss of a parcel only in case of gross negligence.

A stage-coachman is liable for gross negligence in losing a parcel which he undertook to carry without a reward.

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4.—*Carriers without reward.*] If a person who is not a common carrier, undertakes to convey goods without a reward or compensation, he is not responsible for their loss, or any damage which they may sustain, unless he be guilty of *gross negligence*;<sup>b</sup> and the reason why he is liable, though not a common carrier or to have compensation, is because gross negligence is a deceit to the bailor; for when he trusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him; and a breach of trust undertaken voluntarily is a good ground of action.<sup>c</sup> Where a stage-coachman undertook to carry a parcel from the country to London without reward, and lost it; held, that he was liable for the value of it. Lord Tenterden told the jury that the question was whether there was gross negligence on the part of the defendant. Though nothing was to be paid for the conveyance, still as the defendant received it, it was his duty to take care of it, and deliver it at the place to which it was addressed; and it being his duty to deliver it, the jury were to say whether there was great negligence on the part of the defendant; if there was not great and somewhat extraordinary negligence on his part, the verdict ought to be for him.<sup>d</sup> *Gross negligence* is a question for the jury.<sup>e</sup> The *care* which a *reasonable* man might be supposed to take of his own may be a very good criterion as to *gross negligence*, but they are not precisely the same things; therefore the proper question to be left to the jury, is whether the defendant has been guilty of gross negligence.<sup>f</sup>

<sup>a</sup> *Syms v. Chaplin*, 1 Nev. & Perry, 29. See *ante*, 513 to 525, as to another point.

<sup>b</sup> *Jones on Bailments*, 62.

<sup>c</sup> Per Holt, C. J., in *Coggs v. Barnard*, 2 Lord Raym. 911; which is one of the most celebrated cases ever decided in Westminster Hall; and justly so, since the elaborate judgment of Lord Holt contains the first well ordered exposition of the English law of bailments. *Smith's Select Cases*, 96.

<sup>d</sup> *Beauchamp v. Powley*, 1 M. & Rob. 38.

<sup>e</sup> *Duff v. Budd*, 2 B. & B. 177. (7 Eng. C. L. 399.) 6 Moore, 469. *Batson v. Donovan*, 4 B. & A. 21, (6 Eng. C. L. 333,) *ante*, 526. *Beauchamp v. Powley*, 1 M. & Rob. 38. *Doorman v. Jenkins*, 4 N. & M. 170. 2 Ad. & Ell. 256, (29 Eng. C. L. 80,) *ante*, 39.

<sup>f</sup> Per Patteson, J., *id.*

## SECTION VI.

## OF THE PRIVILEGES OF CARRIERS, AND HEREIN OF THEIR LIEN.

As by the common law, a carrier is bound to convey goods for a reasonable compensation,<sup>a</sup> he may insist on receiving that compensation before he takes charge of the goods; or if he carries them without being paid, he may detain them for his hire,<sup>b</sup> even against the right owner, though they were delivered to him by a person who had no right to them; for since the law compels him to carry them, it will give him a remedy for the premium due for the carriage,<sup>c</sup> unless he enters into an agreement with the owner inconsistent with the right to retain the goods till payment.<sup>d</sup> But by the common law a carrier has not a lien on such goods for his general balance, though such a lien may be created by an express stipulation between the parties, and a contract to that effect may be inferred from the particular mode of dealing between them; \*but as general liens are not favored by the common law, no

A carrier has a lien on the goods for the amount due for the carriage, but not for his general balance.

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general usage among carriers to retain for their general balance, will be sufficient to bind other parties, unless it were so general as to furnish an inference, that the party who dealt with the carrier, had knowledge of it, and so to warrant a conclusion that he contracted with the carrier on that ground.<sup>e</sup> Where a carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners, and goods were sent by him addressed to the order of *J. S.*, a mere factor; held, that the carrier had not, as against the real owner, a lien on such goods for the balance due from *J. S.*, for *J. S.* was not the real owner.<sup>f</sup> A carrier who, by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, has no right to retain them against the consignee, for a general balance due to him for the carriage of other goods of the same sort sent by the consignor, for they became the property of the consignee from the moment of delivery to the carrier.<sup>g</sup> An usage for carriers to retain goods as a lien for a general balance against the consignee, does not affect the right of the consignor to stop the goods in *transitu*.<sup>h</sup>

<sup>a</sup> Jackson v. Rogers, 2 Show. 327. B. N. P. 70. 1 Saund. 312, c. 2 Lord Raym. 867. Per Ellenborough, C. J., 6 East, 525.

<sup>b</sup> Skinner v. Upshaw, 2 Lord Raym. 752. Per Lord Ellenborough, in Rushford v. Hadfield, 6 East, 522, 525, 527.

<sup>c</sup> Per Holt, C. J., 2 Lord Raym. 867.

<sup>d</sup> Crawshay v. Homfray, 4 B. & A. 52. (6 Eng. C. L. 345.)

<sup>e</sup> Rushford v. Hadfield, 6 East, 519. 7 East, 224. Holderness v. Collison, 7 B. & C. 212. (14 Eng. C. L. 30.)

<sup>f</sup> Wright v. Snell, 5 B. & A. 350. (7 Eng. C. L. 127.)

<sup>g</sup> Butler v. Woolcott, 2 N. R. 64.

<sup>h</sup> Oppenheim v. Russell, 3 B. & P. 42.

A carrier's lien may be defeated by giving up possession of the goods, and when once waived it cannot be resumed. "The right of lien," said Lord Kenyon, "has never been carried further than while the goods continue in the possession of the party claiming it."<sup>a</sup>

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## \*SECTION VII.

## ACTIONS AGAINST COMMON CARRIERS.

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Assump-  
sit or case  
will lie  
against a  
carrier.

1.—*Form of action.*] THE general form of action against carriers is *assumpsit* for a breach of an express or implied contract, to take proper care of goods entrusted to them.<sup>b</sup> But *case* is also sustainable on their common law liability, for any injury resulting from their neglect or breach of duty in the course of their employ.<sup>c</sup>

Either form of action has its advantages and inconveniences. The advantages of declaring in *assumpsit* are, that the plaintiff may join to the special count those common counts to which he has causes of action applicable; on the other hand, in this form of action he is subject to a defence of set off, or of the defendant's bankruptcy,<sup>d</sup> and he cannot join a count in *trover*; but he is no longer liable to be met by a plea of abatement, for not joining all the parties,<sup>e</sup> as was formerly the case. If the declaration be in *case*, a count in *trover* may be added, where there is evidence of a conversion, and the defendant cannot plead a set off; but a count in *assumpsit* cannot be added.<sup>f</sup>

When *tro-*  
*ver* will lie

*Trover* also may be supported against a carrier for delivering goods to a wrong person though by mistake;<sup>g</sup> or for delivering them on a forged order;<sup>h</sup> or for abusing his trust; as if he draws out part of the contents of a vessel and fills it with

<sup>a</sup> Sweet v. Pym, 1 East, 5. And see Kinlock v. Craig, 3 T. R. 119. Yates v. Railston, 8 Taunt. 293. (4 Eng. C. L. 109.)

<sup>b</sup> Boson v. Sandford, 2 Salk. 440. Clarke v. Gray, 6 East, 560. Dale v. Hall, 1 Wils. 292. S. N. P. 417.

<sup>c</sup> Govett v. Hardinge, 3 East, 62. Corbett v. Parkington, 6 B. & C. 268. (13 Eng. C. L. 170.) Ross v. Johnson, 5 Burr. 2825. Brotherton v. Wood, in Error, 6 Moore, 141. 9 Price, 408. 3 B. & B. 54. (7 Eng. C. L. 345.) Woodward v. Booth, 7 B. & C. 301. (14 Eng. C. L. 48.)

<sup>d</sup> Parker v. Norton, 6 T. R. 695.

<sup>e</sup> 11 G. IV & 1 W. IV, c. 68, s. 5.

<sup>f</sup> Corbett v. Parkington, 6 B. & C. 268. (13 Eng. C. L. 170.)

<sup>g</sup> Youl v. Harbottle, Peake, 49. Devereux v. Barclay, 2 B. & A. 702.

<sup>h</sup> Lubbock v. Inglis, 1 Stark. 104. (2 Eng. C. L. 215.)

water;<sup>a</sup> or breaks open a box containing goods and sells \*them.<sup>b</sup> \*531  
 But trover will not lie where the goods are lost or destroyed by accident, though the owner may have an action on the case;<sup>c</sup> nor for a bare non-delivery;<sup>d</sup> unless the goods be in the possession of the defendant, and he refuse to deliver them on demand.<sup>e</sup> A carrier's assertion that he has delivered goods to the consignee, which is false, is no evidence of a conversion.<sup>f</sup> So, if a carrier has a lien on the goods, trover will not lie for refusing to deliver them up, unless a tender of his claim is made.<sup>g</sup> But if he refuses to deliver the goods on a different ground, without mentioning his lien, he cannot afterwards set it up as a defence to the action.<sup>h</sup>

2.—*Who may bring the action.*] An action against a car- In general  
 rier for the loss of goods must be brought by the person in the con-  
 whom the legal right of property in the goods was vested at signee of  
 the time, "for he is the person who has sustained the loss, if the goods  
 any, by the negligence of the carrier, and whoever has sus- must  
 tained the loss is the proper party to call for compensation, bring the  
 from the person by whom he has been injured."<sup>i</sup> Therefore action.  
 the action against a carrier for the loss of goods sent by a vendor  
 to a vendee, must in general be brought in the name of the  
 latter, because the law implies that, by delivery to the carrier,  
 the goods become the property of the consignee and at his risk  
 (subject to the vendor's right of stoppage in *transitu*.)<sup>j</sup> And  
 it is immaterial whether the consignee gave directions to have  
 the goods sent by the particular carrier selected by the con-  
 signor or not. "It appears to me," said Lord Alvanley, C. J.,  
 "to be a proposition as well settled as any in the law, that if a  
 tradesman order goods \*to be sent by a carrier, though he does \*532  
 not name any particular carrier, the moment the goods are de-  
 livered to the carrier it operates as a delivery to the purchaser;  
 the whole property immediately vests in him; he alone can  
 bring an action for any injury done to the goods; and if any  
 accident happen to the goods, it is at his risk.<sup>k</sup>

And even where the consignee (who resided at Naples) had ordered goods to be sent to him, from Birmingham, "on insurance being effected. Terms, three months credit *from the time of arrival*," and the goods were accordingly sent (an insurance having been effected) by the owner of a vessel bound to Naples, through whose negligence they were damaged.

<sup>a</sup> Richardson v. Atkinson, 1 Stra. 576.

<sup>b</sup> 2 Saund. 47. 2 Stark. Ev. 839.

<sup>c</sup> Ross v. Johnson, 5 Burr. 2825. 2 Saund. 47, f.

<sup>d</sup> *Id.* Per Lord Ellenborough, C. J., in Severin v. Keppell, 4 Esp. 157.

<sup>e</sup> Dewell v. Moxon, 1 Taunt. 391.

<sup>f</sup> Attersoll v. Briant, 1 Camp. 409.

<sup>g</sup> 2 Saund. 47, f. n.

<sup>h</sup> *Id.* 5th ed. Boardman v. Sill, 1 Camp. 410, n.

<sup>i</sup> Per Lord Kenyon, C. J., in Dawes v. Peck, 8 T. R. 339.

<sup>j</sup> *Id.* Snee v. Prescott, 1 Atkin, 248. Godfrey v. Furzo, 3 P. Wms. 186. Vale v. Bayle, Cowp. 294. 2 Saund. 47, h. 1 Chitty on Pl. 6.

<sup>k</sup> Dutton v. Solomonson, 3 B. & P. 584.

Held, that the property in the goods vested in the consignee, as soon as they were despatched from Birmingham; and that the actual arrival of the goods was not a condition precedent to render him liable to pay for them, and that therefore he might maintain an action against the ship-owner for the injury done to the goods;<sup>a</sup> and the same rule obtains though the carrier be paid by the vendor; for the vendor does not thereby become an insurer of the goods.<sup>b</sup> Though it was formerly decided otherwise.<sup>c</sup> But the vendor in delivering the goods must do all that is necessary to furnish the vendee with a remedy against the carrier in case of a loss; otherwise the vendee will not be liable to the vendor.<sup>d</sup> Therefore, where a carrier gave notice that he would not be liable above 5*l.*, unless the goods were insured, it was held, that the vendor not having insured, could not recover the price of the goods against the vendee, on the ground of delivery to the carrier; “for,” as Lord Ellenborough, C. J., said, “the vendor had an *implied authority*, and it was his duty to do whatever was necessary to secure the responsibility of the carriers, for the safe delivery of the goods.”<sup>e</sup> Yet, in a few days after the decision of the preceding case, Lord Ellenborough held otherwise at *Nisi Prius*.

\*533 “Upon the general question,” said “his Lordship, “I am not now called upon to give any decisive opinion, but as it is in practice so unusual, under those notices, to enter and insure goods as above the limited value, *I shall be inclined to hold that the vendor is not bound to do so, without express instructions for that purpose.* Were he to insure of his own accord with the carriers, how far would the purchaser be liable for the heavy additional expenses thus incurred?”<sup>f</sup>

Where the bill of lading stated the goods to be shipped by order, and on account of the consignee, it was held that the consignor could not maintain an action against the ship-owner in respect of the goods.<sup>g</sup> But where the bill of lading stated the goods to be shipped by the plaintiffs, to be delivered at Surinam, to the order of *L—*, and the freight was paid by the plaintiffs in London, Lord Ellenborough, C. J., held, an action for non-delivery would lie at the suit of the plaintiffs; as there was a privity of contract established between those parties, by means of the bill of lading, the plaintiffs would hold the sum recovered from the carrier as trustee for the real owner.<sup>h</sup> Where by the bill of lading the captain was to deliver the goods for the consignor, and in his name to the consignee, and the latter at the time of shipment had no property in the goods; held, that an action against the ship-owners

<sup>a</sup> *Fragano v. Long*, 4 B. & C. 219. (10 Eng. C. L. 313.)

<sup>b</sup> *King v. Meredith*, 2 Camp. 639.

<sup>c</sup> *Davis v. James*, 5 Burr. 2680. *Moore v. Wilson*, 1 T. R. 659.

<sup>d</sup> *Buckman v. Levi*, 3 Camp. 416.

<sup>e</sup> *Clarke v. Hutchins*, 14 East, 475.

<sup>f</sup> *Cothay v. Tute*, 3 Camp. 129.

<sup>g</sup> *Brown v. Hodgson*, 2 Camp. 36.

<sup>h</sup> *Joseph v. Knox*, 3 Camp. 320.

for damage done to the goods must be brought in the name of the consignor, though the consignee had insured the goods, and advanced the premiums of insurance before the arrival of the ship.<sup>a</sup>

If goods be forwarded for sale on approval, the consignor is the party to sue the carrier for the loss; for no property would vest in the consignee until he received and adopted the goods.<sup>b</sup> So, the bailee of goods sending them by a carrier to the bailor, may sue the carrier for negligence. As where a laundress returned clothes by a carrier, it was held that she might sue him.<sup>c</sup> And where the plaintiffs consigned goods, \*according to an order received, to a person whom they did not know, and who afterwards appeared to be a swindler, but who got possession of them through the carrier's negligence; held, that the consignors might maintain an action for the goods against the carrier, as the property had not passed to the consignee.<sup>d</sup> So, where goods were delivered to a carrier at Exeter to be conveyed to Falmouth, and there to be delivered to an agent who was to forward them to the consignee abroad; and the carrier detained the goods on the ground of a lien against the agent for his general balance; it was held that trover might be maintained against the carrier, at the suit of the consignor.<sup>e</sup>

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3.—*The declaration.*] We have seen that the action against a carrier may be in *assumpsit* or *case*.<sup>f</sup>(1) In a declaration in *assumpsit*, it is not necessary to commence with an inducement of the defendant's being a common carrier, or of the nature of the conveyance; it will be sufficient to state that the goods were delivered to the defendant, and his undertaking to carry them for a reward.<sup>g</sup> In stating the contract, if a carrier only limits his responsibility, (as a carrier by land may still do by a special agreement, or any other carrier by giving notice,) that need not be noticed in pleading; but if a stipulation be made that under certain circumstances (such as in case of a loss occasioned by fire or robbery) he shall not be liable at all, that must be stated.<sup>h</sup> So if he gives notice that he will not pay for the loss of goods exceeding 5*l.* in value, it must be stated; but if he give notice that he will not pay more than 5*l.*

<sup>a</sup> *Sargent v. Morris*, 3 B. & A. 277. (5 Eng. C. L. 283.) *Evans v. Martlett*, Lord Raym. 271.

<sup>b</sup> *Swain v. Shepherd*, 1 M. & Rob. 223. Parke.

<sup>c</sup> *Freeman v. Birch*, 1 Nev. & M. 420. (28 Eng. C. L. 326.)

<sup>d</sup> *Duff v. Budd*, 3 B. & B. 177. (7 Eng. C. L. 399.) 6 Moore, 469. See *Stephenson v. Hart*, 4 Bing. 476. (15 Eng. C. L. 47.)

<sup>e</sup> *Tagliabue v. Wynn*, S. N. P. 416. <sup>f</sup> *Ante*, 529.

<sup>g</sup> *Dale v. Hall*, 1 Wils. 281. 2 Chitty, Pl. 227. S. N. P. 416.

<sup>h</sup> Per Abbott, C. J., in *Latham v. Rutley*, 2 B. & C. 22. (9 Eng. C. L. 11.) 3 D. & R. 211.

(1) (*Ware v. Gray*, 11 Pick. 106.)



The termini should be correctly set forth.

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for the loss of any goods, it need not be stated.<sup>a</sup> The *termini* should be correctly described, for a variance in that respect will be fatal. Where the contract declared upon was for the conveyance of goods from *W.* in the county of Middlesex to *T.* in Essex, the contract proved was to convey the goods from Aldgate in the city of London, \*to that place; it was held a fatal variance.<sup>b</sup> But where the terminus *a quo* was stated to be London, and the evidence was that the coach went from Piccadilly, which is in Westminster, it was held no variance, for London must be taken in the enlarged and popular sense of a collective name, and not in the limited sense applicable to the city only.<sup>c</sup>

So where the declaration stated that the plaintiff delivered a trunk to the defendant to be put in a coach at Chester, in the county of Chester, to wit at, &c., and it appeared by the evidence that it was delivered in the city of Chester, which is a county of itself; it was held no variance, for there was no evidence of the existence of any other place called Chester in the county at large.<sup>d</sup> Where the contract declared upon was for conveying the plaintiff from London to Blackheath, and the evidence was, that the words "London and Blackheath" were painted on the coach door; that the coach was licensed to run from Charing Cross only, and that the plaintiff was taken up at the Elephant and Castle, in St. George's Fields; held to be no variance, as Charing Cross and St. George's Fields are both in common parlance styled London.<sup>e</sup> An averment that the servants of the defendant negligently "drove, conducted, and managed the coach," is not supported by evidence of negligence in sending out an insufficient coach.<sup>f</sup> An allegation that the defendant so carelessly and negligently conducted himself, that by means thereof the goods were lost, is sufficient to admit proof of gross negligence.<sup>g</sup>

Negligence.

Abatement.  
Case.

A plea in abatement for the non-joinder of a co-proprietor or co-partner, is now unavailable.<sup>h</sup>(1)

If the form of action be in *case*, the declaration must show a duty, or a contract from which a duty may be inferred,<sup>i</sup> and must state a breach of the duty according to the fact.<sup>j</sup>

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\*The other points noticed under the head of *assumpsit* will the most part be here applicable.

4.—*The pleadings.*] By the new rules H. T. 4 Will. IV, the

<sup>a</sup> Clarke v. Gray, 6 East, 563.

<sup>b</sup> Tucker v. Cracklin, 2 Stark. 385. (3 Eng. C. L. 394.)

<sup>c</sup> Beckford v. Crutwell, 1 M. & Rob. 187. 5 C. & P. 242. (24 Eng. C. L. 300.)

<sup>d</sup> Woodward v. Booth, 7 B. & C. 301. (14 Eng. C. L. 48.)

<sup>e</sup> Ditcham v. Chivis, 4 Bing. 706. (15 Eng. C. L. 121.) 1 M. & P. 735.

<sup>f</sup> Mayor v. Humphries, 1 C. & P. 251. (11 Eng. C. L. 379.)

<sup>g</sup> Smith v. Horne, 2 Moore, 18. 8 Taunt. 144. (4 Eng. C. L. 50.)

<sup>h</sup> 11 Geo. IV & 1 Will. IV, c. 68, s. 5, *ante*, 520.

<sup>i</sup> Max v. Roberts, 12 East, 89.

<sup>j</sup> 2 Ch. Pl. 459. 2 Starkie, 247.

(1) (See *Bank of Orange v. Brown*, 3 Wend. 158.)

plea of *not guilty* in the latter form of action will operate as a denial of the loss or damage of the goods by the defendant as a carrier for hire, or for the purpose for which they were received. In assumpsit against a carrier, the defendant cannot, under non-assumpsit, give evidence to show that the value of the article, for the loss of which the action was brought, had not been declared at the time of the delivery pursuant to the provisions of 11 Geo. IV, & 1 Will. IV, c. 68, such defence must be specially pleaded.<sup>a</sup>

By the 11 Geo. IV, & 1 Will. IV, c. 68, s. 10, the defendant in an action for the loss of goods, may pay money into court in the same manner and to the same effect as in any other action.<sup>b</sup> Payment of money into court.

5.—*Evidence.*] In an action for the loss of goods, the defendant may require of the plaintiff to prove the *actual* value of the goods.<sup>c</sup>(1) The receipt of the carrier for the goods may be given in evidence to prove contract, and it does not require a stamp.<sup>d</sup> The declarations of a coachman respecting the loss of a parcel are evidence against the carrier.<sup>e</sup> To support an averment of negligence or loss, it will be sufficient for the plaintiff to prove that the goods had not arrived; and where the plaintiff's shopman was called, and stated that he did not know of the delivery, and that the parcel could not have been delivered without his knowledge, it was held sufficient to call on the defendant to prove a delivery.<sup>f</sup> But in an action on the case against the keeper of an office for booking and forwarding parcels, where the declaration alleged that a parcel was delivered to the defendant, and that he promised to take care of it, that it might be forwarded to its destination, and averred that it was lost through his negligence; held, that the averment was not supported by evidence of the parcel being delivered to the defendant, and that it did not reach its destination, for his contract was to deliver the parcel to a carrier only.<sup>g</sup>

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To prove the ownership of the defendants, and their liability for the loss of a parcel sent by a stage-coach, an entry in the register book in Somerset House, stating that the defendants were licensed as owners of a coach, was held insufficient, without some evidence to connect them with it. If the entry had been signed by them, it might be sufficient.<sup>h</sup> But it has been

<sup>a</sup> Syms v. Chaplin, 1 Nev. & Perry, 129, *ante*, 527.

<sup>b</sup> See Fail v. Pickford, 2 B. & P. 234. Hutton v. Bolton, 1 H. Bl. 299. n. Yates v. Willan, 2 East, 128. S. N. P. 420.

<sup>c</sup> 11 Geo. IV & 1 Will. IV, c. 68, s. 9, *ante*, 521.

<sup>d</sup> *Id.* s. 3. See Latham v. Rutley, R. & M. 13. (21 Eng. C. L. 371.)

<sup>e</sup> Mayhew v. Nelson, 6 C. & P. 58. (25 Eng. C. L. 281.)

<sup>f</sup> Griffiths v. Lee, 1 C. & P. 110. (11 Eng. C. L. 333.) Recognised in Gilbert v. Dale, 1 N. & P. 22.

<sup>g</sup> Gilbert v. Dale, 1 N. & P. 22.

<sup>h</sup> Strother v. Willan, 4 Camp. 24.

(1) (The value at the place of delivery. *McGregor v. Kilgore*, 6 Ohio, 361.)

held, that the name painted on a coach was good evidence of the party being the proprietor.<sup>a</sup>

A promise made by the book-keeper of a carrier at the office, to make compensation for the loss of a parcel, cannot be adduced against the carrier as evidence of the delivery, unless the book-keeper be shown to be his general agent.<sup>b</sup>

## SECTION VIII.

### CARRIERS OF PASSENGERS.

A carrier of passengers is liable only in case of negligence.

A CARRIER of passengers is not, like a common carrier of goods, an insurer against all injuries except such as happen through the act of God or the king's enemies.<sup>(1)</sup> "There is a difference," said Mansfield, C. J., "between a contract to carry goods, and a contract to carry passengers. For the goods the carrier is answerable at all events, but he does not warrant the safety of the passengers. His undertaking as to them goes no further than this, that as far as human care and foresight can go, he will provide for their conveyance."<sup>c</sup>

Duties of coach owners.  
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It is the duty of coach proprietors to carry passengers whenever \*they offer themselves and are ready to pay the fare, if they have sufficient room and accommodation. It is also their duty to provide coaches reasonably strong and sufficient for the journey; careful drivers of reasonable skill and good habits, and horses which are steady and not vicious; and before the coach starts, they should make a proper examination and satisfy themselves of it being secure in every respect. If there is the least failure in any of these things, the duty of the coach proprietors is not fulfilled, and they are responsible for any injury or damage that may happen to a passenger.<sup>d(2)</sup>

Coach owners are answerable for the negligence or

Coach owners are not answerable for any injury happening to a passenger from accident or misfortune where there has been no negligence or default in the driver; as where the coachman drove the coach on a bank, whereby it was upset, and the plaintiff, a passenger, seriously injured; and it ap-

<sup>a</sup> Barford v. Nelson, 1 B. & Ad. 571. (20 Eng. C. L. 441.) 50 Geo. III, c. 48, s. 7.

<sup>b</sup> Olive v. Eames, 2 Stark. 181. (3 Eng. C. L. 304.)

<sup>c</sup> Christie v. Griggs, 2 Camp. 81. Aston v. Heaven, 2 Esp. 533. White v. Boulton, Peake, 81.

<sup>d</sup> Per Best, C. J., in Crofts v. Waterhouse, 3 Bing. 321. (11 Eng. C. L. 120.) 11 Moore, 133. Jones v. Boyce, 1 Stark, 493. (2 Eng. C. L. 482.) Bremner v. Williams, 1 C. & P. 414. (11 Eng. C. L. 437.) Harris v. Costair, *id.* 636. (11 Eng. C. L. 505.)

(1) (Camden Co. v. Burke, 13 Wend. 627.)

(2) (Ware v. Gay, 11 Pick. 106.)

peared that the same driver had passed the spot where the accident happened twelve hours before; but in the interval a cottage which stood in the road had been removed, in consequence of which the driver mistook the road, it being moonlight. The judge told the jury that as the road was sufficiently wide and there was no obstruction, the coachman ought to have kept on it; and as the injury had arisen in consequence of a deviation, the plaintiff was entitled to a verdict. The jury having found a verdict for the plaintiff, the court granted a new trial on the ground that the jury ought to have been directed to consider whether or not the deviation was the *result of negligence*.<sup>a</sup> But the proprietors of stage-coaches are answerable for the conduct of their servants. The coachman must exercise the best and soundest judgment; if when a danger occurs, he may adopt one of two courses, and he selects the most hazardous, the owner is responsible for any mischief that ensues.<sup>b</sup> If the coach be passing through a place which the coachman knows to be dangerous, as under a low or narrow gateway, &c., it is his duty to warn the passengers of the danger, so that they may avoid it; or if he neglects to give information \*the owners are liable for any injury which a passenger may suffer, and which he might have escaped if the coachman did his duty;<sup>c</sup> and if a passenger be placed in such a perilous situation in consequence of the coachman's neglect or unskilfulness, that as a prudent precaution for the purpose of self-preservation, he is induced to leap from the coach, the owners are answerable for any injury he may thereby sustain.<sup>d</sup>

unskilfulness of their servants; but if there be no default or negligence on their part they are not liable for injuries happening to passengers.

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The general rule for driving is, that in passing on the road the foremost person shall keep to the left, and the party trying to pass him shall keep to the right, and in meeting, each party shall keep to the left; but this rule is not inflexible. If the road be sufficiently wide, the driver is not bound to keep on the left side, provided he leaves room for other carriages that may meet him on their proper side.<sup>e</sup> And when there is no other carriage on the road, he may drive in any part of it that he thinks proper, and he is not, under such circumstances, responsible for an accident which would not have happened if he had kept on the left side.<sup>f</sup>

Rule of driving.

The proprietors are also liable for any injury that may arise to a passenger from a defect in the original construction of the coach, although the imperfection was not visible, and could not be discovered upon ordinary examination.<sup>g</sup> They are also answerable for the improper position of the luggage. Where

Defect in the construction of the coach.

<sup>a</sup> Crofts v. Waterhouse, *supra*.

<sup>b</sup> Mayhew v. Boyce, 1 Stark. 423. (2 Eng. C. L. 454.)

<sup>c</sup> Dudley v. Smith, 1 Camp. 167.

<sup>d</sup> Jones v. Boyce, 1 Stark. 493. (2 Eng. C. L. 482.)

<sup>e</sup> Wordsworth v. Willan and others, 5 Esp. 273.

<sup>f</sup> Aston v. Heaven, 2 Esp. 533.

<sup>g</sup> Sharp v. Gray, 9 Bing. 457. (23 Eng. C. L. 331.) 2 M. & Scott, 621. Bremner v. Williams, 1 C. & P. 414. (11 Eng. C. L. 437.)

there was luggage on the roof of the coach and no iron railing between the luggage and the passengers, and the plaintiff, being seated with her back to the luggage, was by a sudden jolt thrown from the coach, whereby her leg was broken; in an action against the proprietors, the jury found that the accident arose from the improper construction of the coach, and from the luggage being on the seat. The court held, that these facts amounted to negligence in the defendant.<sup>a</sup>

\*540 If the coach break down it is *prima facie* evidence of negligence in the owners;<sup>b</sup> and if at the time that the coach is upset, \*it was carrying more passengers than the statute allowed, it is conclusive evidence that the accident happened from overloading the coach.<sup>c</sup>

Taking  
places.

If places be taken for several persons to go inside a coach *together*, it is a breach of the contract if the owner only provides *distinct* seats for them; that is some in one part of a double-bodied coach, and the rest in another part of the same coach;<sup>d</sup> and if a party takes a place outside, it is a breach of the agreement if there be more outside passengers than the law allows, provided he refuses to go by the coach on *that account*.<sup>e</sup>

If a person take a place in a stage-coach and pay at the time *only a deposit*, if he be not ready to take his place when the coach is starting, the owner may fill it up with another passenger. But if instead of a deposit only, he pay the whole fare, he may take his place at any stage of the journey, for the proprietor cannot dispose of it.<sup>f</sup>

Lien on  
the lug-  
gage.

The proprietor of a coach has a lien on the luggage of the passenger for his fare, but he cannot detain his person or the clothes which he has on.<sup>g</sup>

Though a postmaster cannot be compelled to let a chaise, yet if a traveller be permitted to go into it and put on his luggage, the postmaster must proceed if his fare is tendered.<sup>h</sup>

<sup>a</sup> Curtis v. Drinkwater, 2 B. & Ad. 169. (22 Eng. C. L. 51.)

<sup>b</sup> Christie v. Griggs, 2 Camp. 79.

<sup>c</sup> Israel v. Clarke, 4 Esp. 259.

<sup>d</sup> Long v. Horne, 1 C. & P. 610. (11 Eng. C. L. 495.)

<sup>e</sup> *Id.*

<sup>f</sup> Ker v. Mountain, 1 Esp. 27.

<sup>g</sup> Wolf v. Summers, 2 Camp. 631. Though it is said that an innkeeper may detain his guest until he pay his reckoning. Newton v. Trig, 1 Show. 245. Manning's Digest, 100.

<sup>h</sup> Massiter v. Cooper, 4 Esp. 260.

\*CHAPTER VI.

ACTION ON THE CASE.

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SECTION I.

WHEN AN ACTION ON THE CASE WILL LIE.

An action on the *case* is an universal remedy given for all personal wrongs and injuries without force; and it is a settled distinction, that where an act is done which is in itself an *immediate* injury to another's person or property there the remedy is usually by an action of trespass *vi et armis*; but where there is no act done, but only a culpable omission, or where the act is not *immediately* injurious, but only by *consequence* and collaterally, there, no action of trespass *vi et armis* will lie, but an action on the case for the damages consequent on such omission or act.<sup>a</sup>(1) A few instances will illustrate this position. \*If a man throw a log of timber into the common highway, and in the act of being thrown, it hit another party, the injury is *immediate*, and trespass is the proper remedy against the person who threw it; but if *after* it has reached the ground, a person passing along the highway fall over it and be hurt, the injury is *consequential* only, and the proper remedy is *case*.<sup>b</sup> So if a person pour water on my land, the injury is immediate; but if he stop up a watercourse on his own land, whereby it is prevented from flowing to mine as usual, or if he places a

Case' is the proper remedy for consequential damages.

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<sup>a</sup> 2 Bl. Com. 122-3.  
<sup>b</sup> Reynolds v. Clarke, 1 Stra. 636, recognised by the court in Day v. Edwards, 5 T. R. 649, and in Leame v. Bray, 3 East, 602.  
(1) (*Case v. Mark*, 1 Ohio, 341.)



spout on his own building in consequence of which water afterwards runs therefrom into my land, the injury is consequential: because the flowing of the water, which was the immediate injury, was not the wrong doer's *immediate* act, but only the consequence thereof, and which will not render the act itself a trespass or immediate wrong.<sup>a</sup>

Running  
down ves-  
sels at sea.

Difficulties often occur in actions for running down vessels at sea, because the force which occasions the injury is not in such cases necessarily the immediate act of the person steering, for the wind and waves may, and generally do, occasion the force, and the personal act of the party rather consists in putting the vessel in the way to be acted upon.<sup>b</sup> Where, in an action on the case for running down the plaintiff's ship, the declaration stated the injury to be done by the negligence and unskilfulness of the defendant in the management of his vessel; after verdict for the plaintiff, on a motion in arrest of judgment on the ground that the action ought to have been in trespass, the court held, that *case* was the proper remedy; for the negligent and improvident management of the defendant's ship did *not* imply any act done by him; the running against the plaintiff's vessel might have been owing to the wind and the tide.<sup>(1)</sup> If it had appeared in evidence that the defendant had wilfully done the act, the plaintiff must have been nonsuited.<sup>c</sup> So where in *trespass* for running down a vessel, it appeared that the defendant, who was master and owner of the vessel by \*which the injury had been done, was on board at the time, but that the pilot, and not the defendant, gave the order which caused the accident; the jury having found that the accident was occasioned by negligence, the court held, that trespass could not be maintained, because the order which occasioned the accident was not given by the defendant.<sup>d</sup> But in a subsequent case, where, in a similar action, it appeared that at the time of the accident the defendant was on board his ship at the helm, but that he was desirous of steering clear of the plaintiff, and that the accident was to be ascribed to his unskilfulness, Lord Ellenborough, held, that trespass and not case was the proper remedy, observing, that whether the injury arose directly or followed consequentially from the act of the *defendant*, was the only just and intelligible criterion of trespass and case. It made no difference that the parties were sailing on shipboard. The defendant was at the helm and guided the motions of the vessel. The winds and the waves were only instrumental in carrying her along in the direction which he communicated.

<sup>a</sup> Reynolds v. Clarke, 2 Lord Raym. 1399. Stra. 634. Haward v. Banks, 2 Burr. 1114. 1 Ch. Pl. 128.

<sup>b</sup> Per Le Blanc, J., in Leame v. Bray, 3 East, 603.

<sup>c</sup> Ogle v. Barnes, 8 T. R. 188.

<sup>d</sup> Haggett v. Montgomery, 2 N. R. 446. Rogers v. Imbleton, *id.* 117.

(1) (*Hawkins v. The Duchess and Orange Steamboat Co.* 2 Wend. 452.)

The force therefore proceeded from him, and the injury which the plaintiff sustained was the immediate effect of that force.<sup>a</sup>

Case is the proper remedy for injuries to real property corporeal where the injury is not immediate but consequential, as for causing land to be overflown.<sup>b</sup> So for the continuance of an act for which trespass lies, after a recovery by the plaintiff in trespass.<sup>c</sup> So for disturbance in the enjoyment of an easement, as by obstructing lights or air.<sup>d</sup> So for injuries to water-courses, where the plaintiff is not owner of the soil, but entitled to the use of the water.<sup>e</sup> So for not repairing fences,<sup>f</sup> or not carrying away tithes.<sup>g</sup> So case is the proper remedy by a reversioner for injuries done to real property.<sup>h</sup> (1) Case is the proper remedy for injuries to rights incorporeal; as for obstructing a private way,<sup>i</sup> or a public way, if the plaintiff has sustained any damage thereby, as if he was delayed on his journey, and obliged to take a more circuitous route.<sup>j</sup> So for disturbance of common of pasture or estovers.<sup>k</sup> So for disturbing a party in the possession of a pew in the church, if it be annexed to a house in the parish; for otherwise no action lies.<sup>l</sup>

Injuries to real property.

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Injuries to incorporeal rights

An action on the case lies for disturbance of an ancient ferry.<sup>(2)</sup> The owner need not have the property in the soil on either side of the river; as this is a possessory action, it is sufficient for the plaintiff to prove that he was in possession when the cause of action arose, and that the ferry had existed for a long time, without proving that it had a legal origin.<sup>m</sup> If there be an exclusive ferry from *A.* to *B.*, it does not prevent persons from going by any other boat from *A.* directly to *C.*, though it lie near *B.*, provided it be not done fraudulently, and as a pretence for avoiding the regular ferry.<sup>n</sup> Where there was an ancient ferry from *A.* to *B.*, which led to a public highway, and another constructed a landing-place in *C.*, a short distance from *B.*, and carried passengers over from *A.* to *C.*, from whence

Disturbance of an ancient ferry.

<sup>a</sup> *Covell v. Laming*, 1 Camp. 497. This ruling, however, is scarcely reconcileable with the current of authorities. See what *Littleale, J.*, says in *Moreton v. Hardern*, 4 B. & C. 229. (10 Eng. C. L. 318.)

<sup>b</sup> *Howard v. Banks*, 2 Burr. 1114.

<sup>c</sup> *Lawrence v. Obee*, 1 Stark. 22. (2 Eng. C. L. 278.) See title "Nuisance."

<sup>d</sup> 2 Saund. 113.

<sup>e</sup> *Carrington v. Taylor*, 11 East, 571.

<sup>f</sup> *Star v. Rokeby*, 1 Salk. 335.

<sup>g</sup> *Shapcott v. Mugford*, 1 Lord Raym. 187.

<sup>h</sup> Com. Dig. Case, "Nuisance," B. 1 Saund. 323, b.

<sup>i</sup> Com. Dig. Case, "Disturbance," A. 2.

<sup>j</sup> *Greasley v. Codling*, 9 Moore, 489. 2 Bing. 263. (9 Eng. C. L. 407.)

<sup>k</sup> Com. Dig. Case, "Disturbance," A. 1.

<sup>l</sup> *Stocks v. Booth*, 1 T. R. 430. *Mainwaring v. Giles*, 5 B. & A. 356. (7 Eng. C. L. 129.)

<sup>m</sup> *Peter v. Kendal*, 6 B. & C. 703. (13 Eng. C. L. 299.) *Trotter v. Harris*, 2 Y. & J. 285.

<sup>n</sup> *Tripp v. Frank*, 4 T. R. 666.

(1) (*Ayer v. Bartlett*, 9 Pick. 156.)

(2) (See, as to ferries, the arguments and authorities cited in *Charles River Bridge v. Warren Bridge*, 11 Peters, 420.)

they passed to the same highway upon which the ancient ferry was established, before it reached any town or village, it was held to be an injury to the ancient ferry, for which an action on the case would lie.<sup>a</sup> But where there was a river passing by several towns or places, it was held that the existence of an ancient ferry over such river from a particular point on one side to a particular point on the other, did not preclude persons from using the river as a public <sup>\*545</sup>highway, from or to all the towns or places on its banks, which were not in a line leading from one terminus of the ferry to the other.<sup>b</sup>

So case lies for disturbance in the enjoyment of an ancient decoy, by discharging guns near it, so as to deprive the plaintiff of the profit of it by frightening away the wild fowl; for if a man useth his art or his skill to take wild fowl, and dispose of them for his profit, this is his trade, and he that hinders another in his trade or livelihood is liable to an action for so hindering him.<sup>c</sup> But an action is not maintainable for frightening away game from a preserve (not being a franchise;<sup>d</sup>) or for disturbing a rookery, because rooks are birds *feræ naturæ*, destructive in their habits, and not protected by any statute, but on the contrary have been declared by the legislature to be a nuisance to the country where they are; the plaintiff therefore could acquire no right of property in them. This is distinguishable from the preceding case of a decoy, for wild fowl are protected by the statute, and they constitute a known article of food, and there the plaintiff had incurred expense, and employed skill in doing that which was useful to the public.<sup>e</sup>

Case will lie against a man for maliciously splitting his cause of action,<sup>f</sup> or procuring a person to commence a suit against another to vex him.<sup>g</sup> So it lies for persuading the plaintiff's wife to live apart from him, whereby he lost the comfort of her society, and the advantage of her fortune.<sup>h</sup> So against a witness for not obeying a subpoena;<sup>i</sup> so for the infringement of a copyright.<sup>j</sup> So it lies for letting loose dangerous animals, for negligence in riding horses, for false and deceitful representations, for unlawfully exercising trades, for injuries to the health or reputation, for a libel, slander, &c.<sup>k</sup> So where the <sup>\*246</sup>owner of a mine neglected to cover over the shaft, in consequence of which the plaintiff's horse fell in and was killed; it

<sup>a</sup> Huzzey v. Field, 2 C. M. & R. 432. 1 Gale, 166.

<sup>b</sup> *Id.*

<sup>c</sup> Carrington v. Taylor, 11 East, 574. 2 Camp. 258. See B. N. P. 79.

<sup>d</sup> *Id.*

<sup>e</sup> Hannam v. Mockett, 2 B. & C. 934. (9 Eng. C. L. 280.) 4 D. & R. 518.

<sup>f</sup> Per Littledale, J., in Smith v. Goodwin, 4 B. & Ad. 420. (24 Eng. C. L. 91.)

<sup>g</sup> *Id.* Com. Dig. Case, "Disturbance," A. 4.

<sup>h</sup> Winsmore v. Greenbank, Willes, 677.

<sup>i</sup> Pearson v. Iles, Doug. 556. Hallett v. Meers, 13 East, 17, n.

<sup>j</sup> Clements v. Goulding, 11 East, 244. Roworth v. Wilkes, 1 Camp. 94.

<sup>k</sup> See 1 Ch. Pl. 132 to 142.

was held that an action on the case would lie against the owner for the loss of the horse.<sup>a</sup>(1)

An action on the case is frequently given by the express provisions of some statute to the party aggrieved;<sup>b</sup> and it has been decided that where a navigation act empowered the company to sue for calls by action of debt, or on the case, an action on the case might be maintained though the defendant was thereby deprived of the means of availing himself of a set off.<sup>c</sup> Where a statute prohibits an injury to an individual, or enacts that he shall recover a penalty, case will lie.<sup>d</sup> It lies at the suit of a landlord against a sheriff for taking goods without paying a year's rent;<sup>e</sup> and *case* only can be sustained against a justice for a conviction which has been quashed, pursuant to 43 Geo. III, c. 141.<sup>f</sup>

Case is the proper remedy against a master for injuries occasioned by the negligence or unskilfulness of his servant;<sup>g</sup> but where a master and servant were *together* in a vehicle, which the servant drove, and the horse ran away, whereby an injury was occasioned which amounted to *trespass* on the part of the servant; the court held, that the master was liable in trespass, for as he was present he had control over his servant; the trespass of the servant, therefore, was the trespass of the master. This case was distinguishable from *Hugget v. Montgomery*;<sup>h</sup> for there the pilot was independent of the master.<sup>i</sup> But the master is not liable for any injury arising from the *wilful* act of his servant; therefore where a servant in the absence of his master, *wilfully* drove his master's chariot against the plaintiff's chaise, it was held, that the master was not liable for the injury done.<sup>j</sup> For no master is chargeable with

Case sometimes given by statute.

Case lies against a master for the negligence of his servant.

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- <sup>a</sup> *Lybray v. White*, 1 Mees. & Wels. 435.
  - <sup>b</sup> Com. Dig. "Action on the statute," A. F.
  - <sup>c</sup> *Huddersfield Canal Co. v. Buckley*, 7 T. R. 36.
  - <sup>d</sup> Com. Dig. "Action on statute," A. F.
  - <sup>e</sup> *Bristow v. Wright*, Doug. 665. *Andrews v. Dixon*, 3 B. & A. 645. (5 Eng. C. L. 410.)
  - <sup>f</sup> *Massey v. Johnstone*, 12 East, 67.
  - <sup>g</sup> *Croft v. Alison*, 4 B. & A. 590. (6 Eng. C. L. 528.) *Morley v. Gainsford*, 2 H. Bl. 442.
  - <sup>h</sup> *Ante*, 543.
  - <sup>i</sup> *Chandler v. Broughton*, 1 C. & M. 29.
  - <sup>j</sup> *M'Manns v. Crickett*, 1 East, 106, *post*, 589.

(1) (So it lies against one who knowingly sells unwholesome meat. *Peckham v. Holman*, 11 Pick. 484. So against a bank for a refusal to deliver to the owner a certificate of stock. *Hussey v. Manufacturers' Bank*, 10 Pick. 415. So against a public officer for refusing plaintiff's vote at a town meeting. *Osgood v. Bradley*, 7 Greenl. 411. So against one who suffered a slave to escape. *Steam Co. v. Hungerford*, 6 Gill & Johns. 291. For withdrawing a deed from the public officer where it had been left for record, whereby the plaintiff's title was subjected to embarrassment. *Hine v. Robbins*, 8 Conn. 342. Against an officer for an escape. *Brown v. Genung*, 1 Wend. 115. Against a magistrate for a *corrupt* refusal to allow an appeal from his decision. *Tompkins v. Sands*, 8 Wend. 462. Where the plaintiff owned and occupied the foundation, and first and second stories of a building, and the defendant owned the third story and roof of the same building, and the defendant suffered the roof to become leaky and ruinous, in consequence of which, the plaintiff's goods in the lower story were damaged; it was held, that an action on the case would not lie, but that the plaintiff's remedy must be sought in Chancery. *Cheesborough v. Green*, 10 Conn. 318.)

the acts of his servant, but when he acts in the execution of the authority given to him.\*

## SECTION II.

### WHEN CASE IS A CONCURRENT REMEDY WITH TRESPASS.

When a party may waive the trespass and sue in case.

When the injury is the result of negligence, case is the proper remedy.

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THERE are many cases in which, though the injury is *immediate*, the plaintiff may waive the *trespass*, and sue in *case* for the consequential damage.<sup>b</sup> "No doubt," said Bayley J., "trespass will lie when an injury is inflicted by the wilful act of the defendant, but it is also clear that case will lie, where the act is negligent and not wilful."<sup>c</sup> "A person may bring trespass," said Blackstone, J., "for the immediate injury, and subjoin a *per quod* for the consequential damage; or *case* for the consequential damage passing over the injury."<sup>d</sup> Where the master of a ship brought case for unlawfully taking his ship, the court held, that though he might have brought trespass for the forcible dispossession, yet he might waive the trespass and sue the defendant in *case* for the loss of the benefit which would have arisen to him from the voyage.<sup>e</sup> In *case* against three defendants, proprietors of a stage coach, the declaration stated, that the defendants so carelessly managed their coach and horses, that the coach ran against the plaintiff and broke his leg. It appeared in evidence that one of the defendants was driving at the time when the accident happened, and the jury found that it happened through his negligent driving; held, that case was the proper form of action against the three, Holroyd, J., observing, "In cases where there is no ground of action, except the trespass, perhaps case will not lie, but where an actual damage has been sustained the trespass may be waived, and an action is maintainable on the special circumstances of the case. Here there was a ground of action independent of the trespass. The real ground of action is the negligence of the driver. Trespass might lie against the driver by reason of his doing the particular act; but still there would be a ground of action against his co-proprietors, and that could only be an action on the case; for they are not by his act made co-trespassers."<sup>f</sup> So it has been held, that where through

\* Per Holt, C. J., in *Middleton v. Fowler*, Salk. 282, cited in 1 East, 108.

<sup>b</sup> *Branscombe v. Bridges*, 1 B. & C. 145. (8 Eng. C. L. 43.) 2 D. & R. 256.

<sup>c</sup> *Moreton v. Hardern*, 4 B. & C. 227. (10 Eng. C. L. 316.) See *Williams v. Holland*, *post*, 548.

<sup>d</sup> In *Scott v. Shepherd*, 2 Bl. 897, *post*, tit. "Trespass."

<sup>e</sup> *Pitts v. Gaince*, 1 Salk. 10; recognised by Holroyd, J., in *Branscombe v. Bridges*, 2 D. & R. 257; and in *Moreton v. Hardern*, 4 B. & C. 228. (10 Eng. C. L. 316.)

<sup>f</sup> *Moreton v. Hardern*, 4 B. & C. 223. (10 Eng. C. L. 316.)

*negligent and careless* driving one vehicle was caused *forcibly to strike* another, case was sustainable for the consequential damages, though the injury was *immediate* upon the violence as it did not appear that the act was *wilful*.<sup>a</sup> So case or trespass will lie against a landlord who, having distrained goods sufficient to pay his rent, abandons the distress, and afterwards makes a second distress for the same rent.<sup>b</sup> So for an excessive distress.<sup>c</sup> So where the light of the defendant's window was obstructed by the defendant's building on a party wall belonging to both parties; it was held, that the plaintiff might maintain trespass or case.<sup>d</sup>

Case is also a concurrent remedy with trespass for maliciously issuing out a *fiat*; for the plaintiff not being subject to the bankrupt laws, the commissioners could have no jurisdiction; in which case trespass is always sustainable, provided the injury be forcible and immediate.<sup>e</sup> So whenever the proceeding is in a court having no jurisdiction, and is malicious and unfounded, the plaintiff may elect to sue in either form of action.<sup>f</sup> Case however, and not trespass is the proper remedy for injuries \*sustained by the *regular process* of a court of competent jurisdiction, as for a malicious arrest or a malicious prosecution.<sup>g</sup> If a party acts himself in apprehending another, he may be liable in trespass; but if he falsely and maliciously and without any probable cause, puts the law in motion, that is properly the subject of an action on the case.<sup>h</sup> Therefore, where the defendant charged the plaintiff with the commission of a felony, who in consequence thereof was taken before a magistrate, and discharged on his promise to appear again; whereupon the defendant made another charge of felony against him, upon which the plaintiff was again put to the bar but discharged on a similar promise; held, that case, and not trespass was the proper remedy against the defendant, for he merely put the law in motion, and did not assist in apprehending the plaintiff.<sup>i</sup> But where the process is *irregular*, trespass is the proper form.<sup>j</sup> Trespass or case will lie for

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<sup>a</sup> Williams v. Holland, 10 Bing. 112. (25 Eng. C. L. 50.) 3 M. & Scott, 540. 6 C. & P. 23. (25 Eng. C. L. 261.)

<sup>b</sup> Smith v. Goodwin, 4 B. & Ad. 413. (24 Eng. C. L. 89.) 2 N. & M. 114. See Branscombe v. Bridges, 1 B. & C. 145. (8 Eng. C. L. 43.)

<sup>c</sup> Holland v. Bird, 3 M. & Scott, 363. 10 Bing. 15. (25 Eng. C. L. 14.) Sturch v. Clarke, 1 N. & M. 671.

<sup>d</sup> Wells v. Ody, 7 C. & P. 410. (32 Eng. C. L.) 1 M. & Wels. 452. 2 Gale, 12.

<sup>e</sup> Chapman v. Pickersgill, 2 Wils. 145. Perkin v. Proctor, *id.* 382. See Doswell v. Impey, 1 B. & C. 163. (8 Eng. C. L. 51.)

<sup>f</sup> Goslin v. Wilcock, 2 Wils. 302.

<sup>g</sup> Bell v. Broadbent, 3 T. R. 185. Johnstone v. Sutton, 1 T. R. 535. Gyfford v. Woodgate, 11 East, 297. Elsee v. Smith, 2 Ch. R. 304. 1 D. & R. 97. (16 Eng. C. L. 19.)

<sup>h</sup> Per Bayley, J., *id.* 102. See tit. "Trespass," *post.*

<sup>i</sup> Barber v. Rollinson, 1 C. & M. 330.

<sup>j</sup> *Id.* see tit. "Trespass," *post.*



seducing a man's wife or daughter, but trespass is the usual remedy.

### SECTION III.

#### A CONCURRENT REMEDY WITH ASSUMPSIT.

Case or  
assumpsit  
will lie  
where  
there is a  
breach of  
duty.

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CASE is a concurrent remedy with assumpsit whenever there is a breach of duty from which the law implies a promise. Thus case or assumpsit will lie against an attorney for negligence or unskilfulness in conducting a cause;<sup>a</sup> or against carriers and other bailees for any injury resulting from personal property entrusted to their care,<sup>b</sup> or against surgeons, or other professional men, or tradesmen, as blacksmiths, for misfeasance; for their liability is founded on the common law, as well as on the contract:<sup>c</sup> and although there be an express contract, a party \*is not bound to resort to that contract as the gist of the action, but he may declare on the tort and say that the party has neglected to perform his duty.<sup>d</sup> "What inconvenience is there," said Lord Ellenborough, "in suffering the party to allege his *gravamen* as consisting in a breach of duty arising out of an employment for hire, and to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise implied from the same consideration of hire?"<sup>e</sup> We have already seen that in many cases the plaintiff may waive a *tort*, and sue in assumpsit.<sup>f</sup>

Where  
there is an  
express  
promise  
and a le-  
gal obliga-  
tion.

Where there is an express promise and a legal obligation results from it, then the plaintiff's cause of action is most accurately described in assumpsit, in which the promise is stated as the gist of the action. But where from a given state of facts, the law raises a legal obligation to do a particular act, and here is a breach of that obligation, and a consequential damage; there, although assumpsit may be maintainable upon the promise implied by law to do the act, still an action on the case founded in tort, is the more proper form of action, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damages resulting from that breach.<sup>g</sup> Where a lessee by *deed poll*, assigned his interest in the demised premises to A., subject to the payment of the rent and the performance of the

<sup>a</sup> *Ante*, 196.

<sup>b</sup> *Ante*, 529.

<sup>c</sup> 1 Saund. 312.

<sup>d</sup> Per Bayley, J., in *Burnett v. Lynch*, 5 B. & C. 605. (12 Eng. C. L. 332.)

<sup>e</sup> In *Covett v. Radnidge*, 3 East, 70. <sup>f</sup> *Ante*, 4.

<sup>g</sup> Per Littledale, J., in *Burnett v. Lynch*, 5 B. & C. 609. (12 Eng. C. L. 334.)

covenants contained in the lease, *A.* took possession and occupied the premises under this assignment, and before the expiration of the term assigned to a third person. The lessor having sued the lessee, and recovered damages for breach of covenant committed during the time that *A.* continued assignee of the premises; it was held, that the lessee might maintain an action on the *case* against *A.* for having neglected to perform the covenants during the time that he continued assignee, whereby the lessee sustained damage; and Abbott, C. J., said, "I think that *assumpsit* would also lie, for the defendant by taking the estate, subject to the payment of rent, and the performance of the covenants in the original lease, thereby made it his duty to pay the rent and perform the covenants; and if by neglecting that duty, a burden is cast upon the person from whom he took the estate, the law will imply a promise, as arising out of that duty, and in that case *assumpsit* will lie. But it by no means follows that because a promise may be implied by law, an action on the case which is in terms founded on the breach of that duty, from which the law implies a promise, may not also be maintainable."<sup>a</sup>

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So case or *assumpsit* will lie for a false warranty on the sale of goods.<sup>b</sup> So against a banker for not honoring his customer's check, if he has funds in his hands.<sup>c</sup>

Case, and not *assumpsit*, is the proper remedy against commissioners under a local act for a neglect of duty, for which they are not personally liable.<sup>d</sup>

## SECTION IV.

### WHEN CASE IS A CONCURRENT REMEDY WITH COVENANT.

CASE is also a concurrent remedy with covenant where there is a legal liability as well as any express covenant. If the master of a ship covenants by charter-party under seal, to convey a cargo, the owner is liable in *case* for negligence, on his general liability, or he may be sued on the charter-party. So case or covenant will lie against a tenant for years after the expiration of his term, for a breach of the covenants during the term; as where a lease was made for twenty-one years, in which the lessee covenanted to yield up the premises repaired at the end of the term; the lessee during the term committed *wilful* waste, and at the expiration of the term delivered up

<sup>a</sup> *Id.* 602. See *Kinlyside v. Thornton*, 2 Bl. 1111.

<sup>b</sup> *Williamson v. Allison*, 2 East, 446. *Stewart v. Wilkins*, Doug. 21.

<sup>c</sup> *Marzetti v. Williams*, 1 B. & Ad. 415. (20 Eng. C. L. 412.) *Ante*, 3.

<sup>d</sup> *Cane v. Chapman*, 2 H. & W. 355. 1 N. & Perr. 104.

the premises to the lessor in a ruinous condition; it was held, that case or covenant was maintainable, for, said the court, "if a tenant for years commits waste, and delivers up the place wasted to the landlord, had there been no deed of covenant, an action of waste, or case in the nature of waste, would have lain. Because the landlord by special covenant acquires a new  
 \*552 remedy, does he "therefore lose the old?"<sup>a</sup> Some recent cases however have made it doubtful whether an action on the case for permissive waste can be maintained against a tenant for years.<sup>b</sup>

## SECTION V.

### ADVANTAGES OF CASE OVER OTHER ACTIONS.

WHERE case and trespass are concurrent remedies, it is in general more advisable to declare in *case*, as the smallest damages will entitle the plaintiff to costs; whereas in trespass, if the damages be under 40s., the plaintiff will in some cases, as in assault and battery, or trespass to land, be entitled to no more costs than damages.<sup>c</sup> So it is more advantageous to declare in case than in assumpsit, where it can be done, for the plaintiff will thereby deprive the defendant of the benefit of a set off<sup>d</sup> and of pleading his certificate,<sup>e</sup> and of pleading in abatement the non-joinder of other parties as defendants;<sup>f</sup> nor will he be liable to be nonsuited or have judgment arrested if he fail in establishing a case against all the defendants.<sup>g</sup> It may also be advantageous to adopt case for the purpose of joining a count in trover.<sup>h</sup>

## SECTION VI.

### CASE FOR INJURIES COMMITTED BY DANGEROUS ANIMALS.

THE owner of a vicious or mischievous animal is liable to

<sup>a</sup> *Kinlyside v. Thornton*, 2 Bl. 1111. 2 Saund. 252.

<sup>b</sup> *Gibson v. Wells*, 1 N. R. 290. *Heine v. Benbow*, 4 Taunt. 764. *Jones v. Hill*, 7 Taunt. 392. (2 Eng. C. L. 149.) 2 Saund. 252. 1 *Id.* 323. But see the observations of Abbott, C. J., respecting *Jones v. Hill*, in *Burnett v. Lynch*, 5 B. & C. 603. (12 Eng. C. L. 332.)

<sup>c</sup> See *post*, tit. "Trespass."

<sup>d</sup> *Smith v. Hodson*, 4 T. R. 211. See *ante*, 154, n. b.

<sup>e</sup> *Parker v. Norton*, 6 T. R. 695.

<sup>f</sup> *Brotherton v. Wood*, 6 Moore 141.

<sup>g</sup> *Govett v. Radnige*, 3 East, 65-70.

<sup>h</sup> *Id.*

an action on the case for any injury committed by such animal, if he had *knowledge* of its mischievous propensity. If a dog have once bit a man, and the owner, having notice thereof, keep the dog and let him go about, and he bite another person, case will \*lie against him at the suit of the person bit, (though it happened by his treading on the dog's toes,) for the owner ought to have hanged him in the first instance.<sup>a</sup> If one knowingly keep a dog accustomed to bite sheep, and the dog bite a horse, it is actionable.<sup>b</sup> But an allegation that a dog was accustomed to worry and bite sheep, is not supported by evidence that he had attacked men; for the allegation is of a *particular habit, which is not proved*.<sup>c</sup> It has been held, that a promise to make recompense, though accompanied with proof that the dog was of a fierce and savage disposition, was no evidence of the defendant's knowledge that the dog was accustomed to bite.<sup>d</sup> But in a recent case, where the defendant, on being informed that his dogs had killed three sheep of the plaintiff's, said he would settle for it, the court held, that it ought to have been submitted to the jury as evidence of the *scienter*; for the ready admission of the defendant, that if his dogs had killed three sheep he would settle for it, was an acknowledgment that he knew he was liable in point of law for any damage done on account of their savage disposition; still, said Parke, B., the evidence ought to have been submitted to the jury, with a strong observation in favor of the defendant. Lord Ellenborough thought it entitled to so little weight that he refused to leave it to the jury. But, though we think, strictly speaking, it is a fact to go to the jury, yet it ought to have no weight at all with them, for the offer may have been made from motives of charity, without any admission of liability at all.<sup>e</sup> It is not essential to support such an action that the dog should belong to the defendant; if he harbors a dog accustomed to bite mankind, and allows him to resort to his premises, it is sufficient.<sup>f</sup> Where the defendant's dog was reported to be mad and he tied him up, and the dog having broke loose bit a child who died of the hydrophobia, it was held, that the defendant was liable to the child's father for the amount of apothecary's bill for attending the child, and that the report \*of the dog being mad was admissible to prove the defendant's *scienter*.<sup>g</sup>

A party keeping a dog or other animal which he knows to be of a vicious disposition, is liable for any injury done by him.

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In an action for an injury by a vicious bull, it was held that the plaintiff was entitled to recover, although it appeared that the bull was attracted by a cow in a particular state, which the plaintiff was driving past the field in which the bull was, and

<sup>a</sup> B. N. P. 77. *Smith v. Pelah*, 2 Stra. 1264.

<sup>b</sup> B. N. P. 77. *Jenkins v. Turner*, Lord Raym. 110.

<sup>c</sup> *Hartley v. Harriman*, 1 B. & A. 620. *Beck v. Dyson*, 4 Camp. 198.

<sup>d</sup> *Thomas v. Motgan*, 1 Gale, 172. 2 C. M. & R. 496.

<sup>e</sup> *M'Kone v. Wood*, 5 C. & P. 1. (24 Eng. C. L. 187.)

<sup>f</sup> *Jones v. Perry*, 2 Esp. 482.

that the plaintiff first struck the bull on the head to drive him away; for it was the bounden duty of the defendant to secure the bull after he had notice of its vicious propensities.<sup>a</sup> A party has a right to keep a fierce dog on his premises for protection at night; therefore, if a person, having incautiously or improperly entered premises at night, sustain an injury from a dog, he cannot maintain an action for it against the owner.<sup>b</sup> It is no answer to an action for an injury done by the defendant's dog, that on the day previous to the injury the plaintiff had been warned against going near the dog, provided the injury was not occasioned by the plaintiff's own want of caution.<sup>c</sup>

Shooting  
a dog in  
self-pre-  
servation.

If the defendant justify shooting or injuring a dog on the ground of self-defence or the protection of his property, he must show that the dog was in the act of attacking him or his property at the time that he shot him;<sup>d</sup> and it is for the jury to decide whether the defendant struck or shot the dog *bonâ fide* for the preservation of himself or his property.<sup>d</sup> In trespass for shooting a dog, it appeared that, as the defendant was passing the plaintiff's house, the dog ran out and bit his gaiter and ran away, upon which the defendant shot him. Lord Denman said that the circumstance of a dog being of a ferocious disposition and being at large, was not sufficient to justify shooting him; to justify such a course the animal must be actually attacking the party at the time.<sup>e</sup>

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## \*SECTION VII.

## NUISANCE.

Nuisance  
in respect  
to private  
property.

AN action on the case will lie for a nuisance or injury to a man's dwelling-house or real property, or to some right or privilege incident thereto. Thus if a man build a house on his own land, overhanging the house of his neighbor, whereby the rain falls upon it, the latter may maintain case for the nuisance.<sup>f</sup> So, if he fix a spout to his own house, whence the rain falls into the yard of his neighbor and injures the foundation of his buildings.<sup>g</sup> The erection of any thing offensive so

<sup>a</sup> Blackman v. Simmons, 3 C. & P. 138. (14 Eng. C. L. 243.)

<sup>b</sup> Brock v. Copeland, 1 Esp. 203. Sarch v. Blackburn, M. & M. 505. 4 C. & P. 297. (19 Eng. C. L. 394.)

<sup>c</sup> Curtis v. Mills, 5 C. & P. 489. (24 Eng. C. L. 421.) Tindall.

<sup>d</sup> Hanway v. Boulton, 1 M. & Rob. 15. 4 C. & P. 350. (19 Eng. C. L. 415.)  
Jansen v. Brown, 1 Camp. 41. Wells v. Head, 4 C. & P. 568. (19 Eng. C. L. 531.)  
See Protheroe v. Mathews, 5 C. & P. 581. (24 Eng. C. L. 465.)

<sup>e</sup> Morris v. Nugent, 7 C. & P. 572. (32 Eng. C. L.)

<sup>f</sup> Penruddock's Case, 5 Co. 100, b. 2 Rol. 140. 2 Leon. 93.

<sup>g</sup> Fort. 212.

near the house of another as to render it useless and unfit for habitation, e. g. the erection of a swine-stye, lime-kiln, privy, smith's forge, tobacco-mill, or the like, is actionable.<sup>a</sup> But the opening of a window, whereby the privacy of a neighbor is disturbed, is not actionable;<sup>b</sup> nor will an action lie for a thing which merely abridges the gratification of a person in the enjoyment of his property, as for building a wall which merely intercepts the prospect of another without obstructing the light.<sup>c</sup> To sustain an action for a nuisance there must be a substantial injury. It is not every unpleasantness or inconvenience that will be a good ground of action: there are many nuisances which the law will not recognise, such as building so as slightly to obstruct another's light, or to shut out his view of a fine prospect.<sup>d</sup> An action cannot be maintained for a reasonable use of a person's right, though it may be an annoyance to another; as if a butcher or a brewer use his trade in a convenient place.<sup>e</sup> So an action for a nuisance to a house cannot be maintained, for that which was no nuisance before a window was opened by the plaintiff, and which became a nuisance only by that act.<sup>f</sup>

An action will not lie for a nuisance in a public highway, unless there be a special damage; and the mere obstruction of the plaintiff's business, or delaying him a *little* while on his journey is not such special damage as will sustain an action.<sup>g</sup> But where the plaintiff was delayed by an obstruction in a highway, and thereby prevented from performing the same journey as many times in a day as he otherwise would, if the obstruction had not existed: held, that he might maintain an action on the case against the person who raised the obstruction, as the plaintiff had sustained an individual injury or inconvenience.<sup>h</sup>

If the proximate cause of damage be the plaintiff's unskilfulness, although the primary cause be the misfeasance of the defendant, he cannot recover; at least, if the mischief be in part occasioned by the misfeasance of a third person not sued. Therefore, where *A.* placed lime-rubbish in a highway, and the dust blown from it frightened the horse of *B.* and nearly carried him in contact with a passing wagon, in avoiding which, he unskilfully drove over other rubbish placed in the road by *C.*, and was overthrown and hurt; held, that upon a count stating these facts, *B.* could not recover against *A.*<sup>i</sup> One who is injured by an obstruction in a highway, against which he fell,

<sup>a</sup> 2 S. N. P. 1116.

<sup>b</sup> *Id.*

<sup>c</sup> 9 Co. 58. Knowles v. Richardson, 1 Mod. 55.

<sup>d</sup> Per Lord Denman, C. J., in Evans v. Lisle, 7 C. & P. 562. (32 Eng. C. L.) Pringle v. Wernham, 7 C. & P. 377, (32 Eng. C. L. post, 559.)

<sup>e</sup> Com. Dig. "Action on the case for a nuisance," C.

<sup>f</sup> Lawrence v. Obee, 3 Camp. 514.

<sup>g</sup> Hubert v. Groves, 1 Esp. 148. Paine v. Partrich, Carth. 191.

<sup>h</sup> Greasley v. Codling, 2 Bing. 263. (9 Eng. C. L. 407.)

<sup>i</sup> Flower v. Adam, 2 Taunt. 314.



cannot maintain an action, if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction.<sup>a</sup> Where plaintiff declared that before and at the time of committing the grievance, he was navigating his barges laden with goods along a public navigable creek, and that defendant wrongfully moored a barge across, and kept the same so moored from thence hitherto, and thereby obstructed the public navigable creek, and prevented the plaintiff from navigating his barges so laden, *per quod* plaintiff was obliged to convey his goods a great distance over land, and was put to trouble and expense in the carriage of his goods over land: held, that this was such a special damage for which an action on the case would lie.<sup>b</sup>

- \*557      \*It is the duty of the occupiers of a house having an area fronting the public street, so to fence it as to make it safe to passengers: and it is no defence to an action against him, for neglecting to do so, whereby the plaintiff fell down into the area and was hurt, that when he took possession of the house, and as long back as could be remembered, the area was in the same open state as when the accident happened.<sup>c</sup> If a landlord lets premises with a nuisance upon them, and receives rent, he is liable for a continuance of the nuisance by the tenant; but not in respect of a new nuisance created by the tenant during the term.<sup>d</sup>

Nuisance  
by a pub-  
lic compa-  
ny.

An action may be maintained against an incorporated water-works company, where workmen employed by persons who contract with the company to lay down pipes for conducting water through a public street, do the work in a negligent manner, whereby an individual passing along the street receives an injury;<sup>e</sup> for a company which has been entrusted by the legislature with the execution of a power from which mischief may result, is bound to take especial precaution to guard against such mischief, and in default is responsible in damages.<sup>f</sup> Where a public company has the right by law of taking up the pavement of the street, for the purpose of laying down pipes, the workmen they employ are bound to use such care and caution in doing the work as will protect the king's subjects, themselves using reasonable care, from injury; and if they so lay the stones as to give such an appearance of security as would induce a careful person, using reasonable caution, to tread upon them as safe, when, in fact, they are not so, the company will be answerable in damages for any injury such person may sustain in consequence.<sup>g</sup>

<sup>a</sup> Butterfield v. Forrester, 11 East, 60.      <sup>b</sup> Rose v. Miles, 4 M. & S. 101.

<sup>c</sup> Coupland v. Hardingham, 3 Camp. 398. Ellenborough.

<sup>d</sup> R. v. Pedly, 1 Ad. & Ell. 822. (28 Eng. C. L. 220.) 3 N. & M. 627. Rosewell v. Prior, 2 Salk. 460. Brent v. Haddon, Cro. Jac. 555. R. v. Moore, 3 B. & Ad. 184. (23 Eng. C. L. 52.)

<sup>e</sup> Matthews v. West London Waterworks Company, 3 Camp. 403. Ellenborough.

<sup>f</sup> Weld v. The Gas Light Company, 1 Stark. 189. (2 Eng. C. L. 350.) Ellenborough.

<sup>g</sup> Drew v. New River Company, 6 C. & P. 754. (25 Eng. C. L. 634.) Tindal.

No action will lie by an individual against the inhabitants of \*a county, for an injury sustained in consequence of a county bridge being out of repair.\* \*558

## SECTION VIII.

### OBSTRUCTION OF ANCIENT LIGHTS.

CASE is the proper remedy for obstructing the passage of light or air through ancient windows.<sup>(1)</sup> By 2 & 3 Will. IV, c. 61, s. 3, it is enacted, "that when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith, for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding; unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." Enjoyment of light for twenty years gives an absolute title.

Total privation of light is not necessary to sustain the action. If the plaintiff can prove that, by reason of the obstruction, he cannot enjoy the light in so free and ample a manner as he did before, it will be sufficient.<sup>b</sup> But it has been laid down by a learned judge, that it is not sufficient to constitute an illegal obstruction, that the plaintiff has, in fact, less light than before, nor that his warehouse, the part of his house principally affected, was not used for all the purposes to which it might have been applied. In order to give a right of action and sustain the issue, there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done. It might be difficult to draw the line, but the jury must distinguish between a particular inconvenience and a real injury to the plaintiff in the enjoyment of the premises.<sup>c</sup> And in a recent case Lord Denman, C. J., said, "it is not sufficient that \*a ray or two of light should be obstructed, the question was whether in consequence of the obstruction the plaintiff had less light than before."<sup>d</sup> There must be such a diminution of light as will render the occupation of the house uncomfortable. \*559

\* Russell v. Devon, 2 T. R. 667.

<sup>b</sup> Cotterell v. Griffiths, 4 Esp. 69.

<sup>c</sup> Per Best, C. J., in Back v. Stacey, 2 C. & P. 465. (12 Eng. C. L. 218.)

<sup>d</sup> Pringle v. Wernham, 7 C. & P. 377. (32 Eng. C. L.) Wells v. Ody, id. 410. (32 Eng. C. L.) Parker v. Smith, 5 C. & P. 438. (24 Eng. C. L. 401.)

(1) (An action on the case does not lie against a person for erecting a fence on his own land, whereby he obstructs the lights of his neighbor, let the motive of the obstruction be what it may, if the lights be not ancient lights, or his neighbor has not acquired a right by grant or occupation and acquiescence. Nor does an action lie for opening a window overlook-

If an ancient window be raised and enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of light and air to any part of the space occupied by the ancient window, although a greater portion of light and air be admitted through the unobstructed part of the enlarged window than was anciently enjoyed.<sup>a</sup> If a building, after having been used for twenty years as a malthouse, is converted into a dwelling-house, in its new state it is entitled only to the same degree of light which was necessary to it in the former state, and the owner of the adjoining ground may lawfully erect a wall which prevents the admission of sufficient light for domestic purposes, if what is still admitted would be enough for the making of malt.<sup>b</sup>

The occupier of one of two houses built nearly at the same time, and purchased of the same proprietor, may maintain a special action on the case against the tenant of the other, for obstructing his window lights by adding to his own building, however short the previous period of enjoyment by the plaintiff.<sup>c</sup> And where the owner of a house divided it into two tenements, and demised one of them to the defendant; held, that he was liable to an action on the case, for obstructing windows existing in the house at the time of the demise, although of recent construction, and though there was no stipulation against the obstruction.<sup>d</sup> A window frame erected on a party wall was held not to be a common nuisance within 14 Geo. III, c. 78, so as to deprive the owner of it of his right to the windows, which were proved to be ancient lights; and if it were, that it would not, without conviction, be an answer to an action for obstructing them.<sup>e</sup>

- \* 560 \*If an ancient light has been completely shut up with brick and mortar above twenty years, it loses its privilege.<sup>f</sup> A right to light is acquired by mere user, and may be forfeited by non-user, though for less than twenty years, unless an intention be manifested, when the non-user commences, to resume the light within a reasonable time.<sup>g</sup>

**Effect of a license.** A parol license to put a sky-light over the defendant's area, (which impeded the light and air from coming to the plaintiff's dwelling-house through a window,) cannot be recalled at pleasure after it has been executed at the defendant's expense; at least not without tendering the expenses he had been put to; and therefore no action lies for a private nuisance, in stopping

<sup>a</sup> *Chandler v. Thompson*, 3 Camp. 80.

<sup>b</sup> *Martin v. Goble*, 1 Camp. 320.

<sup>c</sup> *Compton v. Richards*, 1 Price, 27.

<sup>d</sup> *Riviere v. Bower*, R. & M. 24. (21 Eng. C. L. 373.)

<sup>e</sup> *Titterton v. Conyers*, 1 Marsh. 140. 5 Taunt. 465. (1 Eng. C. L. 161.)

<sup>f</sup> *Lawrence v. Obee*, 3 Camp. 514.

<sup>g</sup> *Moore v. Rawson*, 5 D. & R. 234. 3 B. & C. 332. (10 Eng. C. L. 99.)

ing the privacy of another; and, on the contrary, although the doing so be an encroachment, the continuance thereof for 20 years will ripen into a right, which it seems can be prevented only by building opposite to the offensive window. *Makan v. Brown*, 13 Woud. 261.)

the light and air, &c., and communicating a stench from the defendant's premises to the plaintiff's house by means of such sky-light.<sup>b</sup> *A.*, the owner of two adjoining houses, grants a lease of one of them to *B.*; he afterwards leases the other to *C.*, there then existing in it certain windows. After this, *B.* accepts a new lease of his house from *A.* Held, that *B.* cannot alter his tenement, so as to obstruct windows existing in *C.*'s house at the time of *C.*'s lease from *A.*, although the windows are not twenty years old at the time of the alteration.<sup>b</sup> A party may alter the mode in which he has been permitted to enjoy a right to light and air, so as to lose the right altogether.<sup>c</sup>

A reversioner may maintain this action if the obstruction of light be injurious to his reversionary interest; and if the grievance be not removed, he may maintain a second action, and it is no answer thereto, that he had recovered in a former action for the same obstruction.<sup>d</sup>

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\*SECTION IX.

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## INJURY TO BUILDINGS.

UPON the principle that every man should enjoy his property in such a manner as not to injure his neighbor, a party is liable for any damage which may have been occasioned by his *negligence* in using his property.

Where the defendant built a rick of hay near the boundary of his own premises, which was in such a state as to give rise to discussions as to the probability of its igniting, the defendant, being frequently advised to take it down to avoid all danger, said that he would chance it. At length the rick burst into flames from the spontaneous heating of its materials. The flames communicated to the defendant's outhouses, and from thence to the plaintiff's cottages, which were entirely destroyed; held, that an action on the case would lie against the defendant for the injury which he occasioned to the plaintiff through the negligent management of his property; and that it was a proper question to be left to the jury, on a plea of not guilty, whether the defendant was guilty of gross negligence, viewing his conduct with reference to the caution that a prudent man would

Case lies for an injury arising from the negligent management of one's property.

<sup>a</sup> *Winter v. Brockwell*, 8 East, 308. As to what is not a license, see *Bridges v. Blanchard*, 1 Ad. & Ell. 536. (28 Eng. C. L. 143.) 3 N. & M. 691. 5 N. & M. 567.

<sup>b</sup> *Coutts v. Gorham*, M. & M. 396. (22 Eng. C. L. 338.) See *Swansborough v. Coventry*, 9 Bing. 305. (23 Eng. C. L. 286.)

<sup>c</sup> *Garritt v. Sharp*, 1 H. & W. 220. 3 Ad. & Ell. 325. (30 Eng. C. L. 104.)

<sup>d</sup> *Shadwell v. Hutchinson*, 2 B. & Ad. 97. (22 Eng. C. L. 33.)

have observed, and that it was no defence that he had acted *bonâ fide*, and to the best of his judgment.<sup>a</sup> It has been decided, that if an occupier of land burns weeds so near his own boundary that danger ensues to the property of his neighbor, he is liable to an action for the amount of injury done, unless the accident were occasioned by a sudden blast which he could not foresee.<sup>c</sup>

Excavating the soil to the injury of a neighboring house.

\*562

*A.* and *B.* having adjacent lands, *A.* built a house at the extremity of his land; *B.* more than twenty years afterwards excavated his own soil for the foundation of a building, without touching the soil or building of *A.*; after the excavation was made, *A.*'s house gave way, so that it became necessary to rebuild it. In an action against *B.* for the damage, it was alleged and found by the jury, that the injury was occasioned by the \*negligent, unskilful, and improper manner in which *B.* had dug his own soil: held that *A.* was entitled to recover. At the trial the learned judge stated to the jury the law to be as follows: "If I have a building on my own land, which I leave in the same state, and my neighbor digs in the land adjacent, so as to pull down my wall, he is liable to an action;" and he told the jury, that if the fall was occasioned by the defendant's negligence, the plaintiff was entitled to a verdict; held that the direction was proper.<sup>c</sup>

When the building is not an ancient house.

It is observable, that in the preceding case, the house which was injured was an ancient house, and the defendant had been guilty of negligence. But where the declaration alleged that *A.* was possessed of a dwelling-house adjoining to a dwelling-house of *B.*, and that *B.* dug into the soil and foundation of his own dwelling-house, so *near* to *A.*'s house, that the wall of the latter gave way; on demurrer, the court held, that the action was not maintainable. "It may be true," said Lord Tenterden, C. J., in delivering the judgment of the court, "that if my land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbor digs in his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it. But it might be otherwise, if it appeared that *A.*'s was an *ancient house*, as that circumstance might imply the consent of the adjoining proprietor at a former time to its erection in that situation.<sup>d</sup> In *Palmer v. Fleshees*, it is said, that if

<sup>a</sup> *Vaughan v. Menlove*, 3 Bing. N. C. 468. (32 Eng. C. L.) 3 Hodges, 51.

<sup>b</sup> Per Tindal, J., *id.* 474. *Turberville v. Stamp*, 1 Salk. 13.

<sup>c</sup> *Dodd v. Holme*, 1 Ad. & Ell. 493. (28 Eng. C. L. 128.) 3 N. & M. 739. See *Brown v. Windsor*, 1 C. & Jer. 20. *Massey v. Goyder*, 4 C. & P. 161. (19 Eng. C. L. 321.) *Trower v. Chadwick*, 3 Bing. N. C. 334, (32 Eng. C. L.) where Tindal, C. J., said, "that it was a good ground of action, that a next neighbor conducted himself carelessly, negligently and unskilfully in pulling down his own wall, as by reason thereof to injure his neighbor's wall."

<sup>d</sup> *Wyatt v. Harrison*, 3 B. & Ad. 871. (23 Eng. C. L. 205.)

land be let to *A.* for building a house, and other land to *B.* for the same purpose; and *A.* erects a house, and \*then *B.* digs a cellar in his land, whereby the wall of *A.*'s house adjoining falls, no action lies;<sup>a</sup> for each may make the best advantage of his own; but it is otherwise (*semble*) if it was an ancient wall or house which fell by such digging. \*563

The mere juxta-position of the walls of two houses does not impose a legal obligation on the owner of one of them, who is about to pull his down, to give notice of such intention to the owner of the other, or to prop up the other house so as to prevent it from falling.<sup>b</sup> In *case* by the reversioner of a house the declaration alleged that the defendant had unskilfully and improperly altered his house, which was adjoining the plaintiff's without shoring up or propping the plaintiff's, that the plaintiff's house fell; the court held, that as the plaintiff neither alleged nor proved any right to have his house supported by the defendant's house, he was not entitled to recover; the plaintiff was bound to protect himself by shoring.<sup>c</sup> But where the declaration alleged that the plaintiff was possessed of a vault which was of *right supported* by parts of an adjoining wall, and that the defendant had wrongfully removed the adjoining wall without taking proper precautions to support or secure the vault whereby the vault was damaged; held, to disclose a sufficient right of action.<sup>d</sup> "The owner of premises adjoining those pulled down," said Lord Tenterden, C. J., "must shore up his own in the inside, and do every thing proper to be done upon them for their preservation; still the omission does not necessarily defeat the action; if the pulling down be irregularly and improperly done, and the injury is produced thereby, the person so acting may be liable for it, although the owner of the house destroyed may not have done all that he ought for his own protection."<sup>e</sup> Notice to prop up. Right to the support of an adjoining house.

Where bricklayers, employed by the commissioners of sewers to repair a public sewer, performed the work in such a manner as to occasion a damage to a neighboring house; held, that \*they were liable to an action on the case, though the work itself appeared to be performed in a skilful manner."<sup>f</sup> \*564

In an action against the defendant for the negligence of his agent in pulling down the party wall between the houses of the plaintiff and defendant, it is a good defence to show that the plaintiff appointed an agent to superintend the work jointly with the defendant's agent, and that both agents were to blame.<sup>g</sup>

<sup>a</sup> 1 Sid. 167, cited in 1 Ad. & Ell. 500. (28 Eng. C. L. 131.) See *Stansell v. Jollard*, S. N. P. 444, 8th ed.

<sup>b</sup> Per Tindal, C. J., in *Trower v. Chadwick*, 3 Bing. N. C. 353. (32 Eng. C. L.)

<sup>c</sup> *Peyton v. The Mayor of London*, 9 B. & C. 725. (17 Eng. C. L. 483.)

<sup>d</sup> *Trower v. Chadwick*, *supra*.

<sup>e</sup> *Walters v. Pfeil*, M. & M. 364. (22 Eng. C. L. 334.)

<sup>f</sup> *Jones v. Bird*, 5 B. & A. 837. (7 Eng. C. L. 277.) 1 D. & R. 497.

<sup>g</sup> *Hill v. Warren*, 2 Stark. 377. (3 Eng. C. L. 390.) *Ellenborough*.



## SECTION X.

## WATERCOURSES.

AN action on the case lies for any diversion or obstruction of a watercourse to the use of which the party complaining has a right; as if a man erect a mill so near to the ancient mill of another, that the water to the latter is obstructed or diverted. So if he stop a watercourse whereby the land of another is overflowed. So if water has been accustomed to run to a well and from thence to a house, and one diverts the stream from coming to the well.<sup>a</sup>(1)

A proprietor of land through which a stream passes has no right to use the water to the prejudice of another proprietor.

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The possessor of land

The right to the use of water rests on clear and settled principles: *prima facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water: every proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors who may be affected by his operations, no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor who claims a right either to throw the water back above or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant <sup>a</sup>or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years, which term of twenty years is now adopted upon a principle of general convenience, as affording conclusive presumption of a grant.<sup>b</sup>

The principle herein laid down was recognised with approbation, and acted upon by Lord Tenterden, C. J., in *Hill v. Mason*,<sup>c</sup> and subsequently by Lord Denman, in the same case,<sup>d</sup> which was an action on the case for diverting a stream of water under these circumstances. In the year 1818, the defendant erected a mill, and the plaintiff permitted him to make a dam at a particular point in a stream which ran through

<sup>a</sup> Com. Dig. tit. "Action for nuisance," A.

<sup>b</sup> Per Leach, Vice Chancellor, in *Wright v. Howard*, 1 Sim. & Stu. 190. The learned judge further added, that an action will lie at any time within twenty years, when injury happens to arise in consequence of a new purpose of the party to avail himself of his common right.

<sup>c</sup> 3 B. & Ad. 312. (23 Eng. C. L. 78.)

<sup>d</sup> 5 B. & Ad. 26. (27 Eng. C. L. 22.) This was on a special case after a second trial.

(1) (*Thompson v. Crocker*, 9 Pick. 53. *Boynton v. Rees*, *Ibid.* 528. *Bigelow v. Newell*, 10 Pick. 348. *Baldwin v. Calkins*, 10 Wend. 167. *McCalmont v. Whitaker*, 3 Rawle, 84. *Hoy v. Sterrett*, 2 Watts, 327. *Simpson v. Seavey*, 8 Greenl. 138. *Blanchard v. Baker*, *Ibid.* 253.)

his farm, and the water of which he (the plaintiff) had for twenty years previously appropriated for watering his cattle and irrigating his land. The defendant accordingly took all the water that he wanted from the point at which he was licensed to erect the dam. In 1823, the plaintiff erected a mill himself, and both mills continued to be sufficiently supplied with water from the same stream until 1829, when, in consequence of some misunderstanding between the parties, the plaintiff demolished the dam above alluded to, and the defendant erected a new dam lower down, and by means of it diverted from the plaintiff's mill at some times *all* the stream, at other times a part of it, and returned the remainder in a heated state into the stream; for which the plaintiff brought this action. The question was whether the plaintiff was entitled to recover for the diversion for the whole water of the stream, or of any and what part of it, or for the heating of the part returned. The case was first tried before Lord Tenterden, who directed the jury to find a verdict for the defendants on the authority of *Williams v. Morland*.<sup>a</sup> A new trial having been granted, upon which there was a verdict for the plaintiff, subject to a special case, which was in substance as above, Lord Denman, in a very luminous judgment, in which all the cases on this subject are reviewed, said, that in any view of the subject, the plaintiff had a right to a verdict for the injury sustained by the obstruction of the whole of the water, and by the obstruction of a part, and the heating of the remainder; for he was the first occupant of it, and the owner and occupier of the land through which it flowed. Adverting to the dicta of judges, Blackstone's Commentaries, and other authorities, which represent water as *publici juris*, his lordship said, "that in considering water to be as public or common, these authorities were to be understood *in this sense only*, that all might drink it, or apply it to the necessary purposes of supporting life; and that no one had any property in the water itself, except in that particular portion which he might have obstructed from the stream, and of which he had the possession; and during the time of such possession only; and it appears to us," added his lordship, "that there is no authority in our law, nor as far we know in the Roman law, (which, however, is no authority in ours,) that the first occupant (though he may be the proprietor of the land above) has any right by diverting the

through which a natural stream flows has a right to the advantages thereof, and may maintain an action against any person who diverts or obstructs it to his prejudice, unless such person has acquired an adverse right by an uninterrupted enjoyment of twenty years.

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<sup>a</sup> 2 B. & C. 910, (9 Eng. C. L. 269,) in which the court held, that flowing water was originally *publici juris*, that an individual could only acquire a right to it by appropriating it to a beneficial purpose. "So soon," said Bayley, J., "as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriated it, subject to that right, all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water, does so in derogation of the primitive right of the public; now if this be the true character of the right to water, a party complaining of the breach of such a right ought to show that he is prevented from having water which he has *acquired* a right to use for some beneficial purpose."

stream, to deprive the owner of the land below of the special benefit and advantage of the natural flow of water therein.”<sup>a</sup>

\*567 This view of the subject accords with the law as laid down by Lord Ellenborough, in *Bealy v. Shaw*, in these terms. “Independently of any particular enjoyment which another has been accustomed to have, every person is entitled to the benefit of a flow of water in his own land, without diminution or alteration, but an adverse right may exist, founded on the \*occupation of another; and although the stream be either diminished in quantity or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it hath existed for so long a time as may raise the presumption of a grant, the other party whose land is below must take the stream, subject to such adverse right. Twenty years’ exclusive enjoyment may or may not afford such a presumption according as it is supported with circumstances to support or rebut the right.”<sup>b</sup>

Result of the authorities. The fair result of the authorities on this subject appears to be, that the owner of land through which a stream flows may, *as soon as he has converted it to a beneficial purpose*, maintain an action against any party for diverting, obstructing, or corrupting it, or for doing any subsequent act, in respect of the water, to his prejudice; unless such party has acquired a right to divert or pen up the stream, or to use the water in a particular way, by an uninterrupted enjoyment of twenty years.<sup>c</sup>

Whether the owner of land through which a stream passes can maintain an action for diverting it before he has thereby sustained any damage, *quære*. But whether the owner of the soil through which a stream flows can maintain an action for a diversion or obstruction of the water, *before he has applied it to profitable purpose or has sustained any damage thereby*, seems not to be satisfactorily settled. In *Williams v. Morland*,<sup>d</sup> the court held, that the plaintiff under such circumstances must allege and prove actual damage; it was not sufficient to show that the defendant had wrongfully diverted the stream. “The mere right to use the water,” said Littledale, J., “does not give a party such a property in the new water constantly coming, as to make the diversion or obstructing of the water, *per se*, give him any right of action.” In *Mason v. Hill*,<sup>e</sup> Lord Tenterden adverted to this decision, observing that it seemed to have been on the ground that in such a case it was *injuria sine damno*; but that it was not then necessary for him to say whether such a principle could be admitted; and Lord Denman, having referred to the \*old authorities on this point, said, “it must not

<sup>a</sup> *Mason v. Hill*, 5 B. & Ad. 1. (27 Eng. C. L. 11.)

<sup>b</sup> Per Lord Ellenborough, C. J., in *Bealey v. Shaw*, 6 East, 214. See 2 & 3 W. IV, c. 71, s. 2, *post*, 571.

<sup>c</sup> *R. v. Trafford*, 1 B. & Ad. 874, (20 Eng. C. L. 498,) in Error. 8 Bing. 204. (21 Eng. C. L. 272.) 2 C. & J. 265. *Bower v. Hill*, 1 Bing. N. C. 549. (27 Eng. C. L. 489.) See 2 & 3 W. IV, c. 71, s. 2. *Balston v. Binstead*, 1 Camp. 463. *Frankum v. Falincuth*, (Earl of,) 6 C. & P. 529. (25 Eng. C. L. 526.)

<sup>d</sup> 2 B. & C. 910. (9 Eng. C. L. 269.)

<sup>e</sup> 3 B. & Ad. 312. (23 Eng. C. L. 76.)

therefore, be considered as clear that an occupier of land may not recover for the loss of the general benefit of the water without a special use or special damage shown."<sup>a</sup>

Where the plaintiff had forty years ago built a mill on the site of an ancient mill, and had within twenty years built a new mill, with a wheel of the same dimensions; and after substituted a wheel of different dimensions, but requiring less water; the alteration was held to be no defence in an action for forcing back the water and injuring the mill. Abbott, J., "The owner is not bound to use the water in the same precise manner, or to apply it to the same mill; if he were, that would stop all improvements in machinery." If, indeed, the alteration made from time to time prejudice the right of the lower mill, the case would be different.<sup>b</sup> Water flowing over a close *prima facie* passes with it by a conveyance of the close.<sup>c</sup>

If a party has acquired a right to use water for one purpose, he may use the same water for another purpose.

In case for obstructing a drain, plaintiff claimed right and title to the drain by virtue of a license granted to his landlords, their heirs and assigns, to make the drain, and have the foul water pass from their scullery through the drain across the defendant's yard, into another yard appurtenant to the premises in plaintiff's occupation; held, that the interest, as declared upon by plaintiff, being in its nature *freehold*, and the license to support it being merely by *parol* and not by *deed*, the action was not maintainable.<sup>d</sup> Where the plaintiff's father by oral license permitted the defendants to lower the bank of a river, and make a weir above the plaintiff's mill, whereby the quantity of water flowing to the mill was diminished; held, that the plaintiff could not maintain an action for continuing the weir.<sup>e</sup>

Right by license.

If a mill-head pens back the water upon the adjoining lands, and injures them, but in consequence of defective construction and want of repair in the wheels and waste gates, the mill pond is, by the working of the mill at seasons wholly selected \*by the miller, without the control of the landowner, so soon and so frequently exhausted, that the adjoining lands are frequently relieved from the stagnating water, and suffer but small damage; the miller (it seems) is justified in repairing and improving the construction of his mill, and thereby penning back the water upon his neighbor's land on the same level for longer periods, although he thereby occasions him a greater damage.<sup>f</sup> Where one declared in case for obstructing a watercourse, upon his possession of a mill with the appurtenances, and that by reason of such his possession he had a right to the use of the water running in a certain tunnel to the mill; such allegation is not supported by proof that the tunnel was made

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<sup>a</sup> Mason v. Hill, 5 B. & Ad. 27. (27 Eng. C. L. 22.)

<sup>b</sup> Saunders v. Newman, 1 B. & A. 258.

<sup>c</sup> Canham v. Fisk, 2 C. & J. 126.

<sup>d</sup> Hewlins v. Shippan, 7 D. & R. 783. 5 B. & C. 221. (11 Eng. C. L. 207.)

<sup>e</sup> Liggins v. Inge, 7 Bing. 682. (20 Eng. C. L. 287.) See as to license, Mason v. Hill, 5 B. & Ad. 1. (27 Eng. C. L. 11.)

<sup>f</sup> Alder v. Savill, 5 Taunt. 454. (1 Eng. C. L. 156.)

on the defendant's land, which he had agreed to let the defendant have for this purpose for a certain consideration, but of which no conveyance was made by him to the plaintiff; and he has since refused assent, because the plaintiff had not the water by reason of the possession of the mill, &c., but by parol license or contract, which could not pass the title to the land, and as a license was revocable and revoked.<sup>a</sup> *B.* having diverted water from the mill of *A.*, for which *A.* recovered damages, took a lease of the water from *A.* for 99 years; held, that though *A.* suffered his mill to fall into decay, yet the owner of his land was entitled to the water as it formerly flowed at the end of the term.<sup>b</sup>

A claim to let off water which had been used on the defendant's land for the precipitation of minerals into a watercourse on the plaintiff's land is a claim to a watercourse within 2 & 3 W. IV, c. 71, s. 2.<sup>c</sup>

**Venue.** In an action on the case for obstructing a watercourse, the venue is local; but a local description is unnecessary.<sup>d</sup>

**Declaration.** In an action for diverting a watercourse from a mill, the declaration should state that the plaintiff was seised of the mill at the time; a seisin in law is, however, sufficient; therefore, an allegation that the plaintiff's father was seised and died, and that the premises descended to the plaintiff, by virtue of \*which he was seised, without saying that he entered it, will be sufficient.<sup>e</sup>

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A declaration for stopping a watercourse without showing how, is bad on demurrer; but good after verdict.<sup>f</sup> If a party who has a right to running water, as an owner of the land, appropriates it, and by his declaration claims it as owner of a mill not 20 years old, this is bad, and the judge at the trial will not allow it to be amended.<sup>g</sup> Where in an action on the case for diverting a stream of water from the plaintiff's mill, the declaration alleged that the defendant placed and raised a certain dam across the stream, and thereby diverted and turned the water, and prevented it from running along its usual course to the plaintiff's mill, and from supplying the same with water for the necessary working thereof, as the same of right ought, and otherwise would have done; held, that such allegation was supported by proof, that in consequence of the dam the water was prevented from being regularly supplied to the plaintiff's

<sup>a</sup> *Fentiman v. Smith*, 4 East, 107.

<sup>b</sup> *Davis v. Morgan*, 4 B. & C. 8. (10 Eng. C. L. 262.)

<sup>c</sup> *Wright v. Williams*, 1 Mees. & Wels. 77. 1 Gale, 410.

<sup>d</sup> *Mersey and Irwell Navigation v. Douglass*, 2 East, 497. *Williams v. Land*, 4 Taunt. 729.

<sup>e</sup> Com. Dig. tit. "Action on the case," (E. 1.) *Hoare v. Dickenson*, 2 Ld. Raym. 1569.

<sup>f</sup> *Anon.* 1 Lord Raym. 452.

<sup>g</sup> *Frankum v. The Earl of Falmouth*, 6 C. & P. 529. (25 Eng. C. L. 526.) 2 Ad. & Ell. 452. (29 Eng. C. L. 140.) 1 H. & W. 1. 4 Nev. & M. 330.

mill, although the stream was not diverted, as the dam was erected above the mill, and the water returned to its regular course long before it reached the mill, and there was no waste of water occasioned by the erection of the dam.<sup>a</sup> Where the plaintiff brought an action on the case for diverting a watercourse, stating that the *locus in quo* was in the possession of one *J. S.*, as his tenant; held, that the averment was satisfied by proof of a mortgage from *J. S.*, the tenant for life, to the plaintiff, who was entitled to the reversion.<sup>b</sup>

A person claiming a right to the use of the watercourse, is Evidence. not a competent witness in this action.<sup>c</sup> Where in an action for diverting water from the mill of *A.*, he obtained a verdict; *A.* and *B.*, afterwards in possession of the mill, brought an action for a similar injury against the same defendants:—it was held, that as *A.* and *B.* were in possession of the mill formerly in the possession of *A.*, it must be presumed they were privy \*in estate with him, and that consequently the record was ad- \*571 missible in evidence in the second action.<sup>d</sup>

## SECTION XI.

### RIGHT OF WAY.

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1.—*Statutory provisions, &c.*] A RIGHT of way is a privilege which an individual or a particular description of persons may have of going over another person's ground; such a right is an incorporeal hereditament; it may arise by prescription, or grant, or private agreement, or license, or from necessity. The usual remedy for a disturbance of a right of way is an action on the case to recover damages. To maintain such an action it is not necessary to show that the plaintiff has sustained any damage or inconvenience if the existence of an obstruction puts his title into hazard, and prevents him from exercising his right whenever he thinks fit to resume it. An action on the case may be maintained, even though no immediate injury be caused by the obstruction.<sup>e</sup> A right of way is often tried also

<sup>a</sup> *Shears v. Wood*, 7 Moore, 345. (17 Eng. C. L. 76.)

<sup>b</sup> *Partridge v. Bere*, 1 D. & R. 272. (7 Eng. C. L. 204.) As to the pleadings in this action, see *post*, 599.

<sup>c</sup> *Jebb v. Povey*, 2 Esp. 679.

<sup>d</sup> *Blakemore v. Glamorgan Canal Co.*, 1 Gale, 78. 2 C. M. & R. 138.

<sup>e</sup> *Bower v. Hill*, 1 Bing. N. C. 549. (27 Eng. C. L. 489.) 1 Hodges, 45.



by an action of trespass.(1) Considerable amendments have been made in the law respecting rights of way, and the mode of establishing a title to such right much facilitated by a recent statute.

Claims to right of way or other easements, not to be defeated after twenty years' enjoyment, by showing commencement.

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After forty years' enjoyment the right to be absolute, unless had by consent or agreement. Period of enjoyment interrupted of.

Allegation of right.

By the 2 & 3 W. IV, c. 71, s. 2, it is enacted, that no claim which may be lawfully made at the common law, by custom, prescription or grant, to any way or other easement, or to any watercourse, or the use of any water to be enjoyed or derived upon over or from any land or water, of our said lord the King, his heirs or successors, or being parcel of the duchy of Lancaster, or of the duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before \*mentioned shall have been actually enjoyed by any person claiming right thereto, without interruption, for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such way or other matter shall have been enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some contract or agreement, expressly given or made for that purpose by deed or writing.

By sec. 4, each of the respective periods before mentioned shall be deemed the period next before some suit or action wherein the claim to which such period may relate shall be brought in question, and no matter shall be deemed an interruption within the meaning of the act unless the same shall be acquiesced in for one year after the party interrupted shall have notice thereof.

By sec. 5, in actions on the case and other pleadings, the claimant may allege his right generally as at present, without alleging the existence of such right from time immemorial; and in pleas to trespass, and other pleadings, where before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed, without claiming in the name of the owner of the fee; and if the other party intend to rely on any proviso, except on disability, contract, or any case or matter of fact or of law, not inconsistent with the simple fact of enjoyment, the same shall be especially alleged, and set forth in answer to the allegation of the party claiming, and not received in evidence on any general traverse or denial of such allegation.

By sec. 6, no prescription shall be allowed in favor of any claim upon proof of the exercise or enjoyment of the right

(1) (*Wilson v. Wilson*, 2 Verm. 68.)

claimed for any less period than that mentioned in this act, as may be applicable to the case.

\*Sec. 7 preserves the rights of infants, married women, lunatics, and tenants for life. \*573

By sec. 8, where any land or water over or from which any such way or other convenient watercourse shall have been enjoyed or derived, shall be held by virtue of a term of life or years, exceeding three years from the granting thereof, the time of enjoyment of any such way during such term, shall be excluded in the computation of the period of forty years, in case the claim shall be resisted within three years after the termination of the term by any person entitled to any reversion, expectant on the determination thereof. Where the land shall be held under a term of life or years.

The following cases have been decided upon the construction of this act.

In an action on the case for obstructing a way to the plaintiff's wharf, it appeared that the plaintiff claimed a way from a wharf called *C.* through *E.*, over the *locus in quo*, called *A.*, where the obstruction took place, into a public highway. *C.* and *E.* were held by a lease for lives under the Bishop of Worcester, by one *R.*, who began to make bricks in *C.* in 1809, which he carried through *E.* and *A.* into the highway. In 1811, *D.*, the occupier of *A.*, (who also held that close as lessee of the Bishop for four lives,) put up a gate to obstruct *R.* in carrying the bricks. *R.* broke it down, and he and the plaintiff who claimed under him, continued to carry bricks over *A.* without interruption for more than twenty years, when the defendant, claiming as assignee of the Bishop's lease under *D.*, obstructed the way, and for that obstruction this action was brought. The jury found that they could not presume that there had been any grant of right of way by the Bishop, and the question was, whether an uninterrupted enjoyment for twenty years gave to the plaintiff a right of way over the defendant's close; and that depended upon the construction of the above act, and particularly sec. 2. Parke, B., in delivering the judgment of the court, having adverted to the provisions of the act, observed, "In order to establish a right of way, and to bring the case within sec. 2, it must be proved that the claimant has enjoyed it for the full period of twenty years; and that he has done so as of right, for that is the form in which by sec. 5, such a claim must be pleaded: and the like evidence would have been required before the statute to prove a claim by prescription, or non-existing *grant*. Therefore if the way shall appear to have been enjoyed by the claimant not openly, and in a manner that a person not rightfully entitled would have used it, but by stealth as a trespasser would have done; if he shall have occasionally asked the permission of the occupier of the land, no title would be acquired, because it was not enjoyed 'as of right.' For the same reason, it would not, if there had been unity of possession during all or part of Twenty years' adverse enjoyment against a tenant for lives, confers no title to an easement.

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Asking permission of the occupier. Unity of possession

Other  
means of  
defeating  
a claim.

Laches or  
acquiescence of  
tenant for  
life.  
No right  
can be  
gained by  
the lessor  
during the  
existence  
of the term

No title  
can be  
gained by  
a user, or  
enjoyment  
which  
does not  
give a va-  
lid title as  
against all  
persons  
having es-  
tates in the  
*locus in  
quo*.

\*575

the time, for thus the claimant would not have enjoyed 'as of right' the easement, but the soil itself. So it must have been enjoyed without *interruption*. Again, such claim may be defeated in any other way by which the same is now liable to be defeated; that is, by the same means by which a similar claim coming by custom, prescription, or grant would now be defeasible; and therefore it may be answered by proof of a grant, or of a license written or parol for a limited period, comprising the whole or part of the twenty years, or of the absence, or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised. So far the construction of the act is clear; and the enjoyment of twenty years having been uninterrupted, and not defeated on any ground above mentioned, would give a good title. But if the enjoyment took place with the acquiescence or by the laches of one who is tenant for life only, the question is, what is the effect according to the true meaning of the statute. In the first place, it is quite clear that no right is gained against the Bishop; whatever construction is put on sec. 7, it admits of no doubt under the 8th; for by the latter section, the Bishop might dispute the right at any time within three years after the expiration of the lease; and if the lease for life be excluded from the longer period as against the Bishop, it certainly must from the shorter; therefore there is no doubt but that this possession of twenty years gives no title as against the Bishop, and cannot affect the right of the see. The important question is, whether this enjoyment, as it cannot give a title as against all persons having estates in the *locus in quo*, gives a title as against the lessee, and the defendants claiming under him, or not at all. We have had some difficulty in coming to a conclusion on this point; but upon the fullest consideration, we think that no title at all is gained by a user which does not give a valid title against all, and permanently affect the see. For in the first place the statute is 'for the shortening the time of *prescription*,' and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended that the enjoyment for those periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all, they are such as absolutely bind the fee in land; and in the next place, the statute nowhere contains any intimation that there may be different classes of rights qualified and absolute, valid as to some persons and invalid as to others. According to the provisions of section 7, the exercise of an easement will not affect the fee during the period of a tenancy for life; in order to affect the fee, there must be that period of enjoyment *against* an owner of the fee. The conclusion therefore to which we have arrived is, that the statute in this case gives no right from the enjoyment that has taken place; and as section 6 forbids a prescription in favor of a claim to be drawn from a less period of enjoyment than that

prescribed by the statute, and as more than twenty years is required in this case to give a right, the jury could not have been directed to presume a grant by one of the termors to the other, by the proof of possession alone. Of course, nothing has been said by the court, and certainly nothing in the statute will prevent the operation of an actual grant by one lessee to the other, proved by the deed itself; or upon proof of its loss, by secondary evidence; nor to prevent the jury from taking the possession into consideration with *other circumstances* as evidence of a grant which they may still find to have been made, if they are satisfied that it *was made in point of fact*. We are therefore of opinion that in the present case the plaintiff is not entitled to recover.\*”

Nothing in the act to prevent the operation of a grant, or to prevent the jury from presuming a grant.

\*In a subsequent case,<sup>b</sup> where the defendant in an action of trespass pleaded an uninterrupted enjoyment of an easement for twenty years, upon which the plaintiff joined issue; the court held, that on that issue the plaintiff might prove applications by the defendant during the twenty years for leave to use the easement, and that it was not necessary for him to reply such license specially. “The issue is,” said Parke, Baron, “whether the occupiers of closes *of right and without interruption*, have had the use and enjoyment for twenty years as they insist, under this issue; therefore, they must show an uninterrupted rightful enjoyment for twenty years. If they had enjoyed it for one week and not for the next, and so on alternately, this plea would not have been proved.” It was held, in *Bright v. Walker*, that the claimant must show that he has enjoyed the way for the full period of twenty years, and that he has done so as of right and without interruption, and that such claim might be answered by proof of a license written or parol for a limited period, comprising the whole or a part of the twenty years. In the present case the permission asked for and given, shows that the occupiers of the closes did not enjoy the way “as of right,” and also that they did not enjoy it uninterruptedly. Lord Lyndhurst, C. B., “The simple issue is, whether there has been a continued enjoyment of the way for twenty years, and any evidence negating the continuance is admissible. Every time that the occupiers asked for leave, they admitted that the former license had expired, and that the continuance of the enjoyment was broken.”

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The following observations by Mr. Justice Patteson, in *Nisi Prius*, are scarcely reconcileable with those above cited. “If there be ten years’ enjoyment of a right of way, and then a cessation under a temporary agreement for another ten years, yet this may be a sufficient enjoyment of the old right for twen-

\* *Bright v. Walker*, 1 C. M. & R. 211. The user of a way during the occupation of tenants does not bind the landlord unless he is aware of it. *Davies v. Stephens*, 7 C. & P. 570. (32 Eng. C. L.)

<sup>b</sup> *Monmouth Canal Company v. Harford*, *id.* 614. (32 Eng. C. L.)

\*577 ty years to make it admissible under the statute; for the agreement to suspend the enjoyment of the right does not extinguish, nor is it inconsistent with the right. So, if instead of a direct path from *A.* to *B.*, another track over the plaintiff's land from *A.* to *C.*, and thence to *B.*, had been substituted by the parol agreement \*of the parties for an indefinite time; yet the user of the substituted time may be considered as substantially an exercise of the old right, and evidence of the continued enjoyment of it.”<sup>a</sup>

On the general traverse of an enjoyment of a right of way for forty years, evidence of parol agreement for leave to use the way within that period, is admissible; but a license or agreement, which covers the whole time for which the right is claimed, must be specially pleaded.

\*578 On an issue joined on a general traverse of an uninterrupted enjoyment of a right of way for forty years, the question was, whether evidence of a parol agreement for permission to use the way, for payment of a sum of money made within the forty years, was admissible. The court held, on the authority of the preceding cases that it was. Lord Denman in delivering the judgment of the court observed, “the greatest difficulty arises from the language of the concluding paragraph of the 5th section, and more particularly from the words, ‘or any cause or matter of fact, or of law not inconsistent with the simple fact of enjoyment,’ as all these matters are required to be specially pleaded, and forbidden to be given in evidence under the general traverse of the enjoyment, as of right, it is plain they are treated by the legislature as consistent with such an enjoyment; and as by the rules of pleading and of logical reasoning, every allegation by way of answer, which does not deny the matter to which it is proposed as an answer, is taken to confess it, we must conclude that the legislature used the words ‘as of right,’ in such a sense, as that a party confessing the enjoyment as of right for forty or twenty years, as the case may be, may account for and avoid the effect of it, by alleging in the one case a consent or agreement, provided it be by deed or writing, and in any other, any contract, &c., written or verbal. It follows that the words ‘as of right’ cannot be confined to an adverse right from all time as far as evidence shows, for if they were so confined, such enjoyment once confessed could not be avoided, by replying that it was had by contract which is not adverse. Again, as the legal right to a way cannot pass except by deed, it is plain that the words ‘enjoyment as of right’ cannot be confined to enjoyment under a strict legal right, for there a consent or agreement in writing not under seal (of which section 2 speaks) could not account for such enjoyment. It seems then, that an enjoyment as of right, must mean an enjoyment had not secretly or by \*stealth, or by tacit sufferance or by permission asked from time to time on each occasion, or even on many occasions of using it; but an enjoyment had openly and notoriously, without particular leave at the time, by a person claiming to use it without danger of being treated as a trespasser, as a matter of right, whether strictly legal by

<sup>a</sup> Per Patteson, J., in *Payne v. Shedden*, 1 M. & Rob. 383.



prescription and adverse user, or by deed conferring the right, or though not strictly legal, yet lawful to the extent of excusing a trespass as by consent or agreement in writing not under seal, in case of a plea of enjoyment for forty years, or by such writing, or by parol consent or agreement, contract or license, in case of a plea of enjoyment for twenty years. According to this view, a license in writing must be replied to a plea of forty years' enjoyment if it cover the whole time; and the same of a verbal license in case of enjoyment for twenty years." His lordship having referred to the point decided in the case of the Monmouth Canal Company v. Harford, observed, "to this ground of decision we quite accord, and it will follow that not only an asking leave, but an agreement commencing within the period may be given in evidence under the general traverse, notwithstanding the words of the 5th section; for the party cannot, and does not, rely on it as an answer to an enjoyment as of right which he confesses, nor as avoiding any such enjoyment during the time covered by the agreement, but as showing that there was not at the time that the agreement was made, an enjoyment as of right, and that so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years; the evidence therefore, ought to have been received."\*(1)

2.—*Right of way by grant.*] In an action on the case for the disturbance of a right of way, leading from a public street through the defendant's premises to a yard at the back of the plaintiff's house, originally forming part of the premises demised by lease to the defendant; held, that a grant of "all ways, used or enjoyed before with the plaintiff's premises"—  
 \*was good, though there was no express grant of the way in question.<sup>b</sup> One who has a grant of an occupation way, may declare in case against the owner of the land over which the way leads, for obstructing it, although it be proved that the public in general had used the way without denial for the last twelve years.<sup>c</sup> Defendant pleaded a grant of right of way by deed, subsequently lost. Plaintiff, in his replication, traversed the grant. At the trial, there being conflicting testimony as to the uninterrupted user of the way, the judge directed the jury, that, if upon this issue they thought defendant had exercised the right of way uninterruptedly for more than twenty years by virtue of a deed, they would find for the defendant; if they thought there had been no way granted by deed, they would

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\* Tickle v. Brown, 1 H. & Woll. 769. 6 Nev. & Man. 230. Beasley v. Clarke, 2 Hodges. 100. 2 Bing. N. C. 705, (29 Eng. C. L. 462,) S. P.

<sup>b</sup> Kooystra v. Lucas, 1 D. & R. 506. S. C. 5 B. & A. 830. (7 Eng. C. L. 274.)

<sup>c</sup> Allen v. Ormond, 8 East, 4.

(1) (On the presumption arising from the enjoyment of a right of way, see *Weirall v. Rhoads*, 2 Wharton, 427.)



find for the plaintiff. Held, that this direction was right.<sup>a</sup> *A.* granted to *B.* land of unequal width, described as abutting on a road on his own soil. It abutted on the broadest part of the road, but in the narrowest part of it a narrow strip of the grantor's land intervened between the road and the premises granted. Held, that the grantor and those claiming from him were concluded from preventing the grantee from coming out into the road over this slip of land.<sup>b</sup>

Where one seised in fee of premises and of the soil over which a way, not of necessity, has been used by the occupier of them, grants those premises "with all ways, roads, &c., to the same belonging, or in anywise appurtenant," no way will pass unless legally appurtenant, or unless it appears from the grant itself, that the parties meant to use the word in a sense more extended than the legal one. Such intention cannot be collected from parol matter dehors the deed.<sup>c</sup> A grant of *W. & S.* "with all ways used and occupied or enjoyed therewith," extends to ways used over other lands of the grantor, but does not convey to the grantee a right to ways used to and from one of those parcels over the other.<sup>d</sup> Where an underlease described the road demised and the ways granted

\*580 \*by the words "all ways thereunto appertaining;" it was held, that a right of way over the original lessor's soil, did not pass by these words.<sup>e</sup> A private right of way may also be granted as a special permission. As where the owner of land grants to another a liberty of passing over his grounds to go to church, to market, or the like, in which case the grant is confined to the grantee alone, he cannot assign it to another, or justify taking another with him.<sup>f</sup> If a lessor, having used convenient ways over his own adjoining land during his own occupation, demises premises with all ways appurtenant, unless it be shown in evidence that there was some way appurtenant in *alieno solo*, to satisfy the words of the grant, it shall be intended that he meant the ways used, and they shall pass, though he miscall them appurtenant.<sup>g</sup>

5.—*Extent of right.*] Under a right of way over a close to a particular place, a man cannot justify going beyond the place; therefore, if a defendant justify passing along a private way, under a right of way to close *A.*, the plaintiff may reply that he went beyond *A.*(1) It is not a good justification in trespass, that the defendant has a right of way over part of the plaintiff's land, and that he had gone upon the adjoining

<sup>a</sup> *Livett v. Wilson*, 3 Bing. 115. (11 Eng. C. L. 57.)

<sup>b</sup> *Roberts v. Karr*, 1 Taunt. 495.

<sup>c</sup> *Barlow v. Rhodes*, 1 C. & M. 439.

<sup>d</sup> *Plant v. James*, 2 N. & M. 517.

<sup>e</sup> *Harding v. Wilson*, 2 B. & C. 100. (9 Eng. C. L. 39.)

<sup>f</sup> *Woodfall's Landlord and Tenant*, 519.

<sup>g</sup> *Morris v. Eggington*, 3 Taunt. 24.

(1) (*Kirkham v. Sharp*, 1 Wharton, 323.)

land because the way was impassable from being overflowed by a river. For he who has the use of a thing ought to repair it; and for anything that appeared, the overflowing might have happened by the neglect of the defendant; and it did not appear that he had no other road.<sup>a</sup> But a public road is governed by a different principle; if the highway be impassable the public may pass on the adjoining soil.<sup>b</sup>

Under a grant of way from *A.* to *B.*, "in, through, and along" a particular way, the grantee is not justified in making a transverse road across the same.<sup>c</sup> A right of way for \*agricultural purposes is a limited and qualified right of way, and does not necessarily confer a right to use such a way for general and commercial purposes.<sup>d</sup> Evidence of a prescriptive right of way for all manner of carriages, does not necessarily prove a right of way for all manner of cattle. For the extent of the usage is evidence of a right only commensurate with the user.<sup>e</sup> When it is sought to establish a right to an easement by user, and it appears that the user had varied, it is for the jury to say, whether the user has been commensurate with the right claimed.<sup>f</sup> If a man having a right of way over close *A.*, for the occupation of close *B.*, purchase an adjoining close *C.*, he cannot use the way for the occupation of the latter close.<sup>g</sup> \*581

A rector cannot claim a permanent right of way for the purpose of carrying away his tithe, unless by prescription or grant; the owner and occupier of the soil, provided he does it *bonâ fide* for the convenient management of the farm, has a right to vary and stop up a way by which tithe has been carried, although the alteration puts the tithe owner to great inconvenience by compelling him to use a more circuitous route for the purpose of carrying away his tithe.<sup>h</sup>

4.—*Way of necessity.*] A right of way may exist by act and operation of law; for if a man grant a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives a way to come at it, and the grantee may cross the grantor's land for that purpose without being a trespasser. Where the law gives any thing, it gives impliedly whatsoever is necessary for enjoying the same.<sup>i</sup> Where one (even as trustee) conveys land to another, to which there is no access

<sup>a</sup> Taylor v. Whitehead, Doug. 745. Bullard v. Harrison, 4 M. & S. 387.

<sup>b</sup> *Id.*

<sup>c</sup> Senhouse v. Christian, 1 T. R. 560.

<sup>d</sup> Jackson v. Stacey, Holt, 455.

<sup>e</sup> Bullard v. Dyson, 1 Taunt. 279.

<sup>f</sup> Thomas v. Thomas, 1 Gale, 61. 2 C. M. & R. 24. A plea of a right to a footway, is supported by proof of a carriage way, for a carriage way includes a footway. Davies v. Stephens, 7 C. & P. 570. (32 Eng. C. L.) Denman.

<sup>g</sup> Laughton v. Wards, Lutw. 111. See 1 Roll. 391. 2 Stark. Ev. 915.

<sup>h</sup> James v. Dodds, 2 C. & M. 267. 4 Tyr. 101. Cole v. Selby, 6 Esp. 103. Halsey v. Halsey, W. Jones, 230.

<sup>i</sup> 2 Bl. Com. 36.

but over the trustee's land, a right of way passes of necessity as incidental to the grant.<sup>a</sup>(1)

\*582 \*And it seems that if the owner of two closes having no way to one of them but over the other, part with the latter without reserving the right of way, it will be reserved for him by operation of law.<sup>b</sup> So, where one having three closes, sells the two extremes, a road to the middle one is reserved by operation of law.<sup>c</sup> Where a lease of a parcel of building ground described certain premises as abutting on "an intended way of thirty feet wide," which was not then set out, the soil being the property of the lessor, and the lessee under-let the premises, and described them as abutting on "an intended way," without mentioning the width; and the soil of the intended way, together with the adjacent land on the other side, was afterwards sold by the lessor to another person, who narrowed the intended way to twenty-seven feet, by building a wall thereon; held, that the tenant of a house built by the under-lessee, was entitled only to a way of necessity and convenience; which having been left him, he could not maintain an action on the case for the alleged encroachment, he having sustained no actual injury thereby.<sup>d</sup>

A way of necessity is limited by the necessity which created it; and when such necessity ceases, the right of way also ceases; therefore, if, at any subsequent period, the party formerly entitled to such way can approach the place to which it led, by passing over his own land, by as direct a course as he would have done by using the old way, such way ceases to exist as of necessity.<sup>e</sup> A way of necessity exists after unity of possession of the close to which, and the close over which, and after a subsequent severance. If a person purchase close *A.*, with a way of necessity thereto over close *B.*, a stranger's land, and afterwards purchases close *B.*, and then purchases close *C.*, adjoining to close *A.*, and through which he may enter to close *A.*, and then sells close *B.* without reservation of any way, and then sells closes *A.* and *C.*: the purchaser

\*583 \*of close *A.* shall nevertheless have the ancient way of necessity to close *A.* over close *B.*<sup>f</sup> But unity of possession of the land to which the way is claimed as appurtenant with the land over which the way lies, operates as an extinguishment of the right

<sup>a</sup> *Howton v. Frearson*, 8 T. R. 50.

<sup>b</sup> *Id.*

<sup>c</sup> *Clarke v. Cogge*, Cro. Jac. 270. It seems that the way of necessity shall be that which is most convenient to the lessee. *Morris v. Eggington*, 3 Taunt. 24.

<sup>d</sup> *Harding v. Wilson*, 3 D. & R. 287. 2 B. & C. 96. (9 Eng. C. L. 41.)

<sup>e</sup> *Holmes v. Goring*, and *Same v. Elliott*, 9 Moore, 166. S. C. 2 Bing. 76. (9 Eng. C. L. 324.)

<sup>f</sup> *Buckby v. Coles*, 5 Taunt. 311. (1 Eng. C. L. 115.)

(1) (A right of way from necessity extends to a single way. It is always from *strict necessity*, and this necessity cannot be created by the party claiming the right. It never exists where a man can get to his property through his own land, however inconvenient the way through his own land may be. *McDonald v. Lindall*, 3 Rawle, 492.)

of way,<sup>a</sup> provided the estate which the party has in both lands right of be equal, in duration, quality, and all other circumstances of way. right.<sup>b</sup> If, however, the party has different estates, as an estate in fee in the land over which, and a term of years in the land in respect of which, the way exists, the easement is suspended only and not extinguished; for while he holds them both, the right belonging to the leasehold is not wanted, but if he parts with the leasehold, the right of easement goes along with it. The very circumstance of its being called a suspension shows that it revives on separation.<sup>c</sup>

A way of necessity cannot be pleaded generally without showing the manner in which the land over which it is claimed is charged with it.<sup>d</sup>

5.—*Statement of the termini.*] In an action for an inter-  
ruption of a right of way, the *termini* of the way should be  
correctly stated in the declaration, and proved: a variance be-  
tween the proof and the allegation is fatal. The same rule  
holds in pleading a right of way, but if both the termini be  
correctly stated, it is not necessary to take notice of the inter-  
vening land. There is one difference between pleading a pub-  
lic and a private way; in the former it is not necessary to set  
out the termini, in the latter both must be set out with certain-  
ty. It is not necessary, however, to set forth with precision  
all the closes over which the private way extends. There may  
be a convenience in requiring all the intervening closes to be  
set out, because the plaintiff thus knows the right claimed, and  
the record may be more certain evidence of the right estab-  
lished; but, on the other hand, there may be great practical in-  
convenience, for at the trial the defendant will be encumbered  
\*with the difficulty of proving a way over all those closes.\*  
As where in an action of trespass the defendant pleaded, that  
he was seised in fee of land next adjoining to one of the said  
closes in which, &c., and thus claimed in respect thereof a way  
from the said laid unto and into, through, over, and along the  
said closes in which, &c., and unto and into a certain common  
king's highway, and at the trial it appeared that he had a pre-  
scriptive right of way from his land into and over the land of  
third persons, and *thence* into and over the plaintiff's closes,  
and thence into a common highway; it was held, that the plea  
was sufficiently sustained.<sup>f</sup>

The *ter-  
mini*  
should be  
correctly  
stated in  
the plead-  
ings.

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<sup>a</sup> Whalley v. Thompson, 1 B. & P. 371. Wright v. Rattray, 1 East, 377.

<sup>b</sup> Co. Litt. 313, b. Rose v. Hermitage, Carth. 241.

<sup>c</sup> Thomas v. Thomas, 2 C. M. & R. 24. 1 Gale, 61.

<sup>d</sup> Bullard v. Harrison, 4 M. & S. 387. As to the pleadings in this action, see *post*, 599.

<sup>e</sup> Per Taunton, J., in Simpson v. Lewthwaite, 3 B. & Ad. 233. (23 Eng C. L. 59.)

<sup>f</sup> *Id.* Jackson v. Shillito, cited 1 East, 381. Rouse v. Bardin, 1 H. Bl. 351. See Wright v. Rattray, 1 East, 377, where it was held, that a claim of a right of way from *A.* over the defendant's close into *D.* could not be sustained, because it appeared

## SECTION XII.

## OF THE PARTIES TO AN ACTION ON THE CASE.

1. Plaintiffs.

2. Defendants.

PAGE

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1.—*Plaintiffs.*] In general this action must be brought by the party whose person or property has sustained the injury complained of. Where *A.* chartered the whole of the defendant's ship, the defendant agreeing to receive a full cargo and to deliver it to *A.* or his assigns, and the plaintiff, to whose orders the goods were assigned, brought an action against the defendant for negligence in stowing the goods, and it appearing that the plaintiff was only the agent of *A.*, he was nonsuited.<sup>a</sup> With respect to real property, actual possession, whether lawful or not, will entitle a party to maintain an action for any injury committed by a stranger or any person not having a better title.<sup>b</sup> But a mere right to enter is not sufficient.<sup>c</sup> The absolute or general owner \*of personal property may in general support an action for an injury thereto, though he has never had actual possession, it being a rule of law that property in personal chattels draws to it the possession.<sup>d</sup> A person having the immediate reversion or remainder of a real estate may maintain an action on the case for waste or any injury to his reversionary interest.<sup>e</sup> But the reversioner cannot maintain an action for an act which is injurious to the tenant in possession only and not to the reversion.<sup>f</sup> So an heir cannot maintain an action for waste committed in the time of his ancestor, nor the grantee of a reversion for waste committed before the grant.<sup>g</sup>

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Heir.  
Grantee of  
a reversion.

Personal  
representative cannot maintain an action.

In case of the death of the party injured, the maxim *actio personalis moritur cum persona* applies to all cases of personal wrongs; therefore an executor or administrator cannot maintain an action for any injuries affecting the life or health

that a close called *C.* over which the road once led, was formerly possessed by the owner of close *A.*, and by him conveyed to another, without reserving a right of way; for thereby it appeared that the right of way claimed did not extend to *D.*, but stopped at *C.*; as the unity of possession destroyed the right of way from thence to *D.*

<sup>a</sup> *Moore v. Hopper*, 2 N. R. 411.

<sup>b</sup> *Graham v. Peat*, 1 East, 244. *Welch v. Nash*, 8 *id.* 394.

<sup>c</sup> *Dyson v. Collick*, 5 B. & A. 600. (7 Eng. C. L. 203.)

<sup>d</sup> 2 Saund. 47.

<sup>e</sup> 1 Saund. 322. 2 Saund. 252, *b.* *Shadwell v. Hutchinson*, M. & M. 350. (14 Eng. C. L. 484.)

<sup>f</sup> *Baxter v. Taylor*, 4 B. & Ad. 72. (24 Eng. C. L. 26.) *Young v. Spencer*, 10 B. & C. 145. (21 Eng. C. L. 47.) In an action by the reversioner the tenant is a competent witness to prove the injury. *Doddington v. Hudson*, 1 Bing. 257. (8 Eng. C. L. 314.)

<sup>g</sup> *Id.*

of the deceased, as for unskilfulness of medical practitioners, the imprisonment of the party brought on by the negligence of his attorney; but where damage done to the personal estate of the deceased can be stated on the record, an executor or administrator, as the representative of the temporal property of the deceased, can maintain an action for it.<sup>a</sup> And by 3 and 4 W. IV, c. 42, s. 2, executors and administrators may maintain actions on the case for any injury to the real estate of the deceased committed in his lifetime, at any time within six months before his death, provided the action be brought within one year.

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Where there is a joint legal interest existing in two or more persons who have received a joint damage, they should join in the action, or the defendant can take advantage of the omission in abatement.<sup>b</sup> Where defamatory words are spoken of partners \*respecting their trade, they may maintain a joint action for the slander; and it is not necessary for them to show the proportion of their respective shares.<sup>c</sup> But if it appears that some of the plaintiffs are not entitled to support the action, it will be a ground of nonsuit. They must recover, if at all, in respect of a general joint damage, for the court will not take cognisance of separate and distinct injuries in one and the same action. The plaintiffs, therefore, must prove a joint cause of action, such as damage done to joint property, or joint slander of the plaintiffs in their trade.<sup>d</sup> Two persons may join, although their interests be several, if the injury complained of were a joint damage to both.<sup>e</sup>

Joint and  
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2.—*Defendants.*] All persons are liable for their own tortious acts; even parties who are incompetent to contract, such as infants, married women, &c., are liable for torts. A principal or master is responsible for tortious acts committed by his agents or servants in the course of their employment, or in the exercise of the authority that he has given to them, whether such servants be immediately retained by himself or by those whom he has employed. As where *A.* having a house by the road side, contracted with *B.* to repair it for a stipulated sum, *B.* contracted with *C.* to do the work, and *C.* with *D.* to furnish the materials. The servant of *D.* brought a quantity of lime to the house and placed it in the road, by which the plaintiff's carriage was overturned; held, that *A.* was answerable for the damage, for all the sub-contracting parties were in the

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<sup>a</sup> Per Lord Ellenborough, C. J., in *Chamberlain v. Williamson*, 2 M. & S. 415.

<sup>b</sup> 1 Saund. 291, k. But it should seem that where the action is substantially and necessarily founded on a contract, the form of it in *tort* will not prevent the plaintiff from being nonsuited for the nonjoinder of the other persons interested. *Id.* 5th Ed. 2 Saund. 116.

<sup>c</sup> *Forster v. Lawson*, 3 Bing. 452. (13 Eng. C. L. 48.) *Cooke v. Batchelor*, 3 B. & P. 150.

<sup>d</sup> *Id.* 2 Stark. Ev. 209. 2 Saund. 116. *Id.* 291, d. 1 Saund. 291.

<sup>e</sup> *Solomons v. Medez*, 1 Stark. 191. (2 Eng. C. L. 351.)



\*587 employ of the defendant; and he who has work going on for his benefit and on his premises, must be civilly answerable for the acts of those whom he employs.<sup>a</sup> Where the owner of a boat which was accustomed to ply for hire, and to carry passengers across a haven, employed a servant for that purpose, and the servant on one occasion received a passenger on board, and carried him across the haven, near the line of an ancient ferry, and paid the \*fare over to his master; held, that the servant was acting at the time in the course of his master's service, and for his master's benefit, and that the master was answerable for his act, and would have been liable in an action on the case for such act, if it had been distinctly proved to have amounted to an evasion of the ferry.<sup>b</sup> So, where a master having employed a servant to do some act, the servant out of idleness employed another to do it, and that person, in carrying into execution the orders which had been given to the servant, committed an injury to the plaintiff, for which the master was held liable.<sup>c</sup> It has been laid down that, where a person hires a coach upon a job, and a job coachman is sent with it, the person who hires the coach is liable for any mischief done by the coachman while in his employ, though he is not his servant.<sup>d</sup>

The principle is clearly established, that a man is responsible for the acts of his servants done under his authority, whether they be hired personally by himself, or by another whom he entrusts with the hiring of servants; and that he is also liable for injuries done upon his premises by persons employed thereon for his benefit. "Whatever," said Abbott, C. J., "is done for the working of my mine, or the repair of my house, by persons mediately or immediately employed by me, may be considered as done by me. I have the control and management of all that belongs to my land or my house; and it is my fault if I do not so exercise my authority as to prevent injury to another."<sup>e</sup> The inference also from the authorities, is, that a party is not liable for the tortious acts of another not authorised by him, though committed in the performance of services on his behalf, unless the person committing the tort be his servant or under his control at the time.

Where *A.* borrowed a horse and chaise, and took *B.*, a friend, along with him on an excursion, *B.* driving; held, that an action on the case lay against *A.* for an injury occasioned

<sup>a</sup> *Bush v. Steinman*, 1 B. & P. 404.

<sup>b</sup> *Huzzey v. Field*, 2 C. M. & R. 432, *ante*, 544.

<sup>c</sup> Mentioned by Eyre, C. J., *id.* 408. *Littledale v. Lord Lonsdale*, 2 H. Bl. 267, 299. *Sly v. Edgley*, 6 Esp. 6. *Bosor v. Sanford*, 2 Salk. 440. *Booth v. Mister*, 7 O. & P. 66. (32 Eng. C. L.) Abinger.

<sup>d</sup> Per Heath, J., 1 B. & P. 409, but this was an extra-judicial opinion only. It has the weight properly belonging to the opinion of a very learned judge, but it could not be received, and has not the authority of a judgment. Per Abbott, C. J., in *Laugher v. Pointer*, 5 B. & C. 576. (12 Eng. C. L. 324.)

<sup>e</sup> In *Laugher v. Pointer*, 5 B. & C. 576. (12 Eng. C. L. 324.)

by the negligent driving of *B.*, and that a declaration, alleging the horse and chaise to be in the possession of *A.*, and that the injury was occasioned by *his* negligent driving, was sustained by the above facts.<sup>a</sup>

\*Where horses are let for hire, and the owner sends a driver along with them, he is in general liable for the negligence of such driver.<sup>b</sup> Where the owner of a carriage hired post-horses to go to Windsor, it was held that the owner of the horses was liable for an accident produced through the misconduct of the driver, because he was his servant.<sup>c</sup> So where a party hired horses to go to Epsom; Lord Ellenborough, said, "that a person who hired horses under such circumstances, had not the entire management and control over them; but that they continued under the control and power of the stable-keeper's servants, who were entrusted with the driving, and that he would be answerable for any accident occasioned by the post-boy's misconduct on the road."<sup>d</sup> But where the plaintiffs hired a chariot for the day, *appointed* the coachman, and *furnished* the horses, it was held, that they were properly described as the owners and proprietors of it;<sup>e</sup> and in a more modern case where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for the day, and the owner of the horses sent a driver of his own selection, who had no wages, but depended on receiving a gratuity from the persons whose carriage he drove; an injury having been occasioned by his negligent driving to the horse of a third person, who, in consequence thereof, brought an action against the owner of the carriage, the Court of King's Bench were equally divided in opinion, as to the liability of the defendant; Abbot, C. J., and Littledale, J., holding that he was not liable on the grounds that the driver was not *his* servant; and Bayley, J., and Holroyd, J., holding that he was responsible, on the grounds that the driver was equally under his authority as if he had chosen him himself, instead of having been selected by the stable-keeper; and therefore for this purpose his servant in the eye of the law. They distinguished this from the preceding cases, because in those cases the horses were let for a *particular purpose* only, as going to a particular place. \*Whereas in this case they were hired for the day to go with the carriage where the defendant chose, and they were to be under his general authority and orders in that respect for a certain time.<sup>f</sup> But in a recent case, where a party hired of a carriage-jobber a barouche and four horses for the purpose of making an excursion for two days to

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Of the party who is liable for injuries arising from the negligence of the driver of post horses or a job carriage.

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It is a question for the jury.

<sup>a</sup> *Wheatley v. Patrick*, 2 Mees. & Wels. 650.

<sup>b</sup> Where a testator bequeathed to all his servants 500*l.* each; it was held, that a coachman supplied by a job-master, together with a carriage and horses, which were hired by the year, was not entitled to be considered a servant. *Chilcot v. Bromley*, 12 Ves. 114.

<sup>c</sup> *Scammell v. Wright*, 5 Esp. 263.

<sup>d</sup> *Dean v. Branthwaite*, *id.* 35.

<sup>e</sup> *Croft v. Alison*, 4 B. & A. 590. (6 Eng. C. L. 528.)

<sup>f</sup> *Laugher v. Pointer*, 5 B. & C. 547. (12 Eng. C. L. 311.)

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Windsor and back to town, and the barouche was driven by the postillions of the carriage-jobber; in an action for an injury done through the negligent driving of the carriage, Lord Abinger ruled that it was a question for the jury, whether the postillions were the servants of the persons hiring or of the owner of the carriage. "It always appeared to me," said his Lordship, "that the court had pursued an erroneous course in *Laugher v. Pointer*, when they allowed the question now raised to be discussed, as if it were a question of law for the judge to decide. It always appeared to me to be quite impossible to lay down any rule of law on such a point, for no satisfactory line can be drawn, at which, as a matter of law, the general owner of a carriage, or rather the general employer of the driver, ceases to be responsible and the temporary hirer becomes so. Each of this class of cases must depend upon its own circumstances, from which the jury are to decide whether the driver was acting as the servant of the owner, or of the party who hired the carriage, at the time that the accident happened."<sup>a</sup>

If a servant driving his master's cart, on his master's business, make a detour from the direct road for some purpose of his own, his master will be answerable in damages for any injury occasioned by his negligent driving while so out of the road.<sup>b</sup> But if a servant take his master's cart without leave, at a time when it is not wanted for the purposes of business, and drive it about solely for his own purposes, the master will not be answerable for any injury he may do.<sup>c</sup>

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Though a master is liable for the tortious acts of his servants done in the exercise of the authority which he has given to them; he is not liable for a wilful trespass committed by them without his assent.<sup>d</sup> The distinction is this; if a servant driving a carriage in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable; but if in order to perform his master's orders he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment.<sup>e</sup>

In *Stone v. Cartwright*,<sup>f</sup> which was referred to in *Laugher v. Pointer*, it was held, that an action for an injury sustained through the improper working of a mine, should be brought against the owner of the mine, or against the workmen who did the injury; but that it could not be brought against an

<sup>a</sup> *Brady v. Giles*, 1 M. & Rob. 494.

<sup>b</sup> *Joel v. Morison*, 6 C. & P. 501. (25 Eng. C. L. 511.) Parke.

<sup>c</sup> *Id.*

*M'Manus v. Cricket*, 1 East, 106.

<sup>d</sup> *Per Curiam*, in *Croft v. Alison*, 4 B. & A. 592. (6 Eng. C. L. 528.) Where one of a ship's crew wilfully injured another ship without the privity of the master; held, that the master was not liable in trespass, though he was on board at the time. *Bowcher v. Noidstrom*, 1 Taunt. 568.

<sup>f</sup> 6 T. R. 411.

agent who hired the workmen. In *Leslie v. Poinds*,<sup>a</sup> which was also cited, the tenant of a house was bound to repair it, but the landlord superintended the repairs; and on being remonstrated with by the commissioners of pavement as to the dangerous state of the cellar, had promised to take care of it, and had put up some temporary boards as a protection to the public, which proved insufficient, and an accident having happened, the landlord was held liable, on the ground of his personal interference about his own property.

Where *A.* and *B.* were in partnership as carriers, and by a private agreement each undertook the conveyance of goods by his own wagons, horses, and drivers, for specified distances, and the plaintiff's window had been damaged through the negligence of *B.*'s servant in driving his wagon; held, that *A.* was liable, for though as between *A.* and *B.*, the person committing the injury was the servant of *B.*, yet for all legal purposes he was also the servant of *A.*, since the wagon was to be drawn for his benefit.<sup>b</sup> If a master command his servant \*to do an *illegal* act, the servant as well as the master will be liable to the party injured; for the servant cannot plead the command of the master in bar of the trespass.<sup>c</sup> It has been held, that the captain of a ship of war was not answerable for damage done in running down another vessel, through the negligence of his lieutenant, who was on the deck and had the direction and management of the steering of the sloop at the time, and when the captain was not upon the deck, nor called upon by his duty to be there; for the lieutenant was not appointed by him, he had no power even to dismiss him, he was neither the servant nor the agent of the captain.<sup>d</sup> The doctrine of *respondeat superior* does not apply to the agents of government discharging a public duty, and not for their own benefit, for it would be unjust to make them responsible for the conduct of persons whom they are *obliged* to employ.<sup>e</sup>

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If several persons have been jointly concerned in the commission of a *tort*, the party injured may sue all jointly, or he may sue each in a separate action.<sup>f</sup> The defendant in such an action cannot plead the non-joinder of a joint tortfeasor in abatement, or in bar, or give it in evidence under the general issue; and even if it appear from the declaration or other pleadings, that the tort was jointly committed by the defendant and another person, no objection can be taken;<sup>g</sup> nor does the joinder of more persons than were liable constitute an objection, for one may be acquitted, and a verdict taken against

If there be several joint tortfeasors they may be sued jointly or severally.

<sup>a</sup> 4 Taunt. 649, cited by Littledale, J., 5 B. & C. 561. (12 Eng. C. L. 317.)

<sup>b</sup> *Weyland v. Elkins*, Holt, 227. (3 Eng. C. L. 71.)

<sup>c</sup> *Sands v. Childs*, 3 Lev. 352.

<sup>d</sup> *Nicholson v. Mouncey*, 15 East, 384.

<sup>e</sup> *Hall v. Smith*, 2 Bing. 159. (9 Eng. C. L. 357.)

<sup>f</sup> *Sutton v. Clarke*, 6 Taunt. 34. (1 Eng. C. L. 298.) *Scott v. Goodwin*, 1 B. & P. 73.

<sup>g</sup> *Id.* 1 Saund. 291. 1 Ch. Pl. 87. *Mitchell v. Turbatt*, 5 T. R. 649.

others.\* But this rule applies only where the action is maintainable for the *tort* simply, without reference to any contract made between the parties. But where an action on the case is brought merely for the non-feasance of a contract; and in order to support the action, a contract must be proved; there, although the plaintiff shapes his case in *tort*, he shall be liable to a plea in abatement, if he omit any defendant, or to a nonsuit, if he join too many; for he shall not by adopting a particular form of action, alter the situation of the defendant.<sup>b</sup>

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There is a settled distinction, however, in this respect, between mere personal actions of tort, and such as concern *real* property; for if only one tenant in common of realty be sued in trespass or case, for any thing respecting the land held in common, as for not setting out tithe, &c., he may plead the tenancy in common in abatement.<sup>c</sup> If several persons be made defendants jointly, where the tort could not in point of law be joint, they may demur, or take advantage of it in arrest of judgment, or on a writ of error;<sup>d</sup> but the plaintiff may, after verdict, obviate the objection by taking a verdict against one only;<sup>e</sup> or, if several damages have been assessed against each, by entering a *nolle prosequi* as to one after the verdict and before judgment.<sup>f</sup>

### SECTION XIII.

#### THE DECLARATION.

In actions on the case, the declaration should set forth, by way of inducement, the circumstances under which the injury was committed, the injury itself, and lastly the consequential damages.

Statement  
of the  
plaintiff's  
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In actions for torts committed in respect of personal or real property, it is necessary to set forth the plaintiff's *title* or interest. For if it does not appear by the declaration, or be admitted by the pleadings, that the plaintiff had some *property* or *interest* in the subject matter of the suit at the time that the wrong complained of was committed, it will be fatal even after verdict.<sup>g</sup> However, as damages are the gist of the suit, a

\* *Govett v. Radnidge*, 3 East, 62. In 1 Saund. 291, *c.*, it is said that *Govett v. Radnidge* was overruled.

<sup>b</sup> 1 Saund. 291, *c.* On the ground above stated, the case of *Green v. Greenbank*, 2 Marsh. 485, (6 Eng. C. L. 375,) was decided, in which it was held that infancy was a good plea to an action on the case of a warranty. *Id.* *Bretherton v. Wood*, 3 B. & B. 54. (7 Eng. C. L. 345.) *Weall v. King*, 12 East, 452.

<sup>c</sup> 1 Saund. 291, *c.* Bac. Ab. "Joint-tenants," &c.

<sup>d</sup> *Barnard v. Gostling*, 1 N. R. 245. 2 Saund. 117, *b. n.*

<sup>e</sup> *Id.*

<sup>f</sup> 1 Saund. 207. 1 Ch. Pl. 86.

<sup>g</sup> 2 Saund. 379. Com. Dig. Plead. 3 M. 9. 1 Ch. Pl. 379. 1 Sid. 184.



strict or particular statement of title is not necessary. Thus, in case for an injury to \*personal property, it is sufficient to allege, that they were the goods of the plaintiff, or that he was lawfully possessed of them as of his own property. If it be in respect of real property, it is sufficient to state that the plaintiff at the time of the injury was possessed of a house, messuage, &c.; and that by reason of such possession, he was entitled to the way, or other right in respect of which he had been disturbed.<sup>a</sup> But though it is not necessary to lay a title by grant or prescription; yet the plaintiff's title or consideration must be proved at the trial.<sup>b</sup> In affirmance of this common law right of declaring generally in these cases, the 2 & 3 Will. IV, c. 71, s. 5, enacts, that "in all actions on the case and other pleadings wherein the party claiming may now, by law, allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be *deemed sufficient*, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation."

Where the plaintiff's right consists in an obligation on the defendants to observe some particular duty, which may be founded either on a *contract* between the parties, or on the obligation of law arising out of the defendant's *particular* character or situation, as in an action against a banker for not honoring a check of his customer's, or against an attorney, surgeon, agent, carrier, or other bailee for negligence; the declaration should state the contract between the parties, or the nature of the duty or the consideration from which the liability results, and on which it is founded; for it will be a fatal defect if it does not show that the defendant was bound to do or omit the act in respect of which he is charged, either by an express contract, or by implication of law in respect of a particular character or situation, as that he was an *attorney*, and that he was *retained* by the plaintiff, or that he was retained at his request for a reward; or that he was a *common carrier*, and that the plaintiff *delivered* \*goods to him to be carried for reward, and that he *accepted* such goods; or that he was a *surgeon*, and was *retained* and employed as such for *reward* to cure the plaintiff, and that he *entered upon the treatment*, &c.<sup>c</sup>

Statement  
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tract or na-  
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duty.

<sup>a</sup> *Id.* 2 Saund. 113. But if instead of relying on the *general* statement of his title, interest, or right, the plaintiff enter into a more particular and detailed statement thereof, and there be a misdescription, it will be a fatal variance, and a ground of nonsuit. 1 Ch. Pl. 385.

<sup>b</sup> 2 Saund. 114, c. 1 Saund. 346, n. 2.

<sup>c</sup> *Elsee v. Gatward*, 5 T. R. 143. *Max v. Roberts*, 12 East, 89. *Rex v. Everett*, 8 B. & C. 114. (15 Eng. C. L. 158.) 1 Ch. Pl. 384. When the declaration is for the breach of an express or implied contract, the consideration must be stated either in terms or in substance; but where it is for a *misfeasance* or *malfeasance*, no consideration need be stated; and when it is founded on the obligation of law unconnected with



**Variance.** With respect to what is a fatal variance in the statement of the plaintiff's right or interest affected, the general rule appears to be, that if the whole of an averment or allegation can be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but if the whole cannot be struck out without getting rid of a part essential to the cause of action, then though the averment be more particular than it need have been, the whole must be proved or the plaintiff cannot recover.<sup>a</sup> "It is a general rule," said Abbott, C. J., "that a variance between the allegation and proof will not defeat a party, unless it be in respect of a matter, which if pleaded would be immaterial."<sup>b</sup> Where in an action for a breach of warranty in selling goods unfit for sale, the declaration alleged that the defendants *knew* the goods to be unfit for sale; held, that the allegation of knowledge being immaterial need not be proved.<sup>c</sup>

If the averment be divisible, the whole need not be proved. If the averment be divisible, though included in one sentence, it is not necessary for the plaintiff to prove the whole, it will be sufficient if he proves so much of it as will support his case.<sup>d</sup> Therefore, if in a declaration for slandering the plaintiff in two specified trades, there be proof of one trade only, it will be sufficient.<sup>e</sup> In case for disturbance of a right of common, the plaintiff alleged that he was entitled by reason of his possession of a messuage and land; held, to be supported by evidence, that he was possessed of *land* only. Per Abbott, C. J.: "This allegation is divisible, and it may be considered as stating that the plaintiff <sup>\*595</sup> was possessed of a house and also that he was possessed of land, and that in respect of both or either he was entitled to the right of common in question; but if there had been words of connection, such as 'thereunto belonging,' or other words of the like import to connect the messuage and the land together as one entire tenement, the plaintiff would not be entitled to recover."<sup>f</sup> In an action by the husband for a malicious prosecution of the husband and wife, the plaintiff may recover on proof of a malicious prosecution of the wife only.<sup>g</sup> Where a declaration for a false return to a *fi. fa.* against the goods of *A.* and *B.*, alleged that *A.* and *B.* had goods within the bailiwick; it was held to be sufficient to prove that either of them had goods within the bailiwick, for the allegation in substance was that there were goods on which the sheriff might have levied.<sup>h</sup>

**Allegations of matter of** A distinction is now clearly established between allegations of matter of substance, and allegations of matter of description. The former require to be *substantially* proved; the latter to

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any contract, it is sufficient to state the circumstances which gave rise to the defendant's particular duty, as in actions against sheriffs, carriers, innkeepers, &c. *Id.*

<sup>a</sup> Per Lawrence, J., in *Williamson v. Allison*, 2 East, 452.

<sup>b</sup> In *May v. Brown*, 3 B. & C. 122. (10 Eng. C. L. 27.)

<sup>c</sup> *Williamson v. Allison*, *supra*.

<sup>d</sup> 2 Saund. 74, b. 209, n. 24.

<sup>e</sup> *Figgins v. Cogswell*, 3 M. & S. 369.

<sup>f</sup> *Ricketts v. Salway*, 2 B. & A. 360.

<sup>g</sup> *Smith v. Hixon*, Stra. 977.

<sup>h</sup> *Jones v. Clayton*, 4 M. & S. 349.

be *literally* proved.<sup>a</sup> Therefore where the declaration against substance, a sheriff for a false return stated that the plaintiff, in Trinity and de- Term, 2 Geo. IV, recovered by the judgment of the court as description. appears by the record, and the proof was of a judgment in Easter Term, 3 Geo. IV; it was held, that the variance was not material; for that the averment, "as appears by the record," was surplusage and might be rejected, inasmuch as the judgment was not the foundation but mere inducement to the action; and as the allegation, that the plaintiff by judgment recovered, &c., was an allegation of substance only, it was sufficient to prove any judgment to warrant the writ.<sup>b</sup> But where in case against a sheriff for recovering goods seized under a *fi. fa.*, without satisfying the landlord the rent due to him, the declaration alleged that the *fi. fa.* issued out of the K. B., and the evidence was, that it issued out of the C. P.; held, a fatal variance; for the seizure and the removal of the goods under the writ was the foundation \*of the action, the plaintiff was \*596 therefore bound to prove the issuing of it according to his allegation.<sup>c</sup> So where the plaintiff in an action against his lessee, for negligently keeping his fire, *per quod* the premises were burnt, alleged that he was tenant under a demise for seven years, and it appeared by the evidence that he was tenant at will; held, a fatal variance, for the injury was to the plaintiff's reversionary interest; the fact of tenancy, therefore, was essential, and the averment that it was a tenancy under a demise for seven years operated as a limitation and description of that which was material.<sup>d</sup>

Whenever precise sums, quantities, and magnitudes, are essential to the nature of the claim, a variance will be fatal. As in an action for a false and deceitful representation of the annual returns of business sold to the plaintiff, it was held, that an averment that the returns amounted to a particular sum was material, and must be proved, although the sums be alleged under a *videlicet*.<sup>e</sup> Whenever an allegation, however superfluous or unnecessary, limits and describes that which is material, it is necessarily descriptive, it becomes part of that which is material, and cannot be rejected.<sup>f</sup>

If the plaintiff undertakes to set out the name of a third person in the declaration, a variance will be fatal. Thus, where in the declaration, in a case for a malicious prosecution, the allegation alleged that the plaintiff appeared before Baron Waterpark, of *Waterfork*, and the proof was that he appeared A variance in the name of a third party will be fatal.

<sup>a</sup> Per Abbott, C. J., in *Stoddart v. Palmer*, 3 B. & C. 4. (10 Eng. C. L. 4.) Per Lord Ellenborough, C. J., in *Purcell v. Macnamara*, 9 East, 160.

<sup>b</sup> *Stoddart v. Palmer*, *supra*. *Phillips v. Shaw*, 4 B. & A. 435. (6 Eng. C. L. 477.) 5 *id.* 964. *Cousins v. Brown*, R. & M. 292. (21 Eng. C. L. 442.) *Draper v. Garrat*, 2 B. & C. 2. (9 Eng. C. L. 3.)

<sup>c</sup> *Sheldon v. Whittaker*, 4 B. & C. 657. (10 Eng. C. L. 435.)

<sup>d</sup> *Cudlipp v. Rundle*, Carth. 202, cited in Doug. 643.

<sup>e</sup> *Gilbert v. Stanislaus*, 3 Price, 54. See the observations of Bayley, J. in *Bevan v. Jones*, 4 B. & C. 407, (10 Eng. C. L. 370,) and in *Broomfield v. Jones*, *id.* 382, (10 Eng. C. L. 363.)

<sup>f</sup> 2 Stark. Ev. 384.

before Baron Waterpark, of *Waterpark*, it was held a fatal variance, as the words "of Waterfork" appeared to be part of the description of the title, and not merely referable to the place of residence.<sup>a</sup>

Statement  
of the in-  
jury.

\*597

With regard to the statement of the *injury* itself, it is frequently sufficient to describe it generally, without setting out the particulars of the defendant's misconduct. Thus, where the declaration stated that the defendant struck the \*plaintiff's cow several blows, whereof she died, and the proof was that the defendant had beaten the cow unmercifully and that the plaintiff to shorten her misery had killed her; held, after verdict, not to be a fatal variance.<sup>b</sup> In an action against a master for the negligence of the servant, the negligence may be stated as that of the master, without noticing the servant; and it is a general rule, that the act of the servant or agent may be alleged to be the act of the master or principal.<sup>c</sup> If the plaintiff declare as reversioner for an injury done to his reversionary interest, he should allege it to be done to the damage of his reversion.<sup>d</sup>

The injury  
must be  
proved as  
laid.

But if the plaintiff set out the injury, and the mode in which it was effected with particularity, it must be proved as laid; for if the proof varies substantially from the statement, it will be a ground of nonsuit. Where the plaintiff alleged that the defendant placed and continued a heap of earth, by means of which the refuse water was prevented from flowing from the plaintiff's house to a certain ditch; and the evidence was that the earth had been so placed originally, as not to obstruct the water, but that in progress of time, the earth was trodden down and fell into the ditch and obstructed it; held, a fatal variance.<sup>e</sup> In an action for diverting a watercourse, a count for diverting and turning a stream of water, will not be supported by proof of penning back and checking it, whereby the water was made to overflow the plaintiff's meadow.<sup>f</sup> An allegation of damage from the unskilful steerage of the defendant's ship, is not supported by evidence of damage from the improper stowing of the defendant's anchor.<sup>g</sup> Where the declaration alleged as special damage, that the plaintiff gave bail to the sberiff at the return of the writ, and the proof was that he had paid the debt, \*and 10*l.* for costs, into the hands of the sheriff; held, a fatal variance.<sup>h</sup>

\*598

But where the declaration stated that defendant erected a dam and diverted a watercourse, whereby the water was prevented from running in its usual course and supplying the

<sup>a</sup> *Walters v. Mace*, 2 B. & A. 756.

<sup>b</sup> *Hancock v. Southall*, 4 D. & R. 202. (16 Eng. C. L. 193.)

<sup>c</sup> *Brucker v. Fromont*, 6 T. R. 659. *M'Manus v. Crickett*, 1 East, 110. *Michael v. Allestree*, 2 Lev. 172.

<sup>d</sup> *Jackson v. Peske*, 1 M. & S. 234.

<sup>e</sup> *Fitzsimonds v. Inglis*, 5 Taunt. 534. (1 Eng. C. L. 181.)

<sup>f</sup> *Griffiths v. Marson*, 6 Price, 1. And see *Williams v. Morland*, 2 B. & C. 910. (9 Eng. C. L. 269.)

<sup>g</sup> *Hullman v. Bennett*, 5 Esp. 226.

<sup>h</sup> *Bristow v. Haywood*, 4 Camp. 213.

plaintiff's mill; it was held to be supported by evidence that, in consequence of the dam, the water was prevented from being *regularly* supplied to the mill, or in sufficient quantities, though the stream was not diverted.<sup>a</sup>

In some actions the *scienter* being material must be alleged and proved; as in a declaration for keeping a dog used to bite mankind. In an action for keeping a mischievous bull, there was no *scienter* in the declaration, and after verdict for the plaintiff, judgment was arrested on that account, and the court said, "they could not intend that it was proved at the trial, for the plaintiff need not prove more than is in his declaration."<sup>b</sup> An averment that dogs were accustomed to bite sheep, is not supported by proof that they were ferocious and accustomed to bite men.<sup>c</sup> *Semble*, that it would be sufficient to state that the dog was of ferocious and mischievous nature.<sup>d</sup> But proof of that fact is no evidence of the *scienter*.<sup>e</sup>

When the law does not necessarily imply that the plaintiff sustained a damage by the act complained of, it is necessary to state in the declaration some special damage as resulting from the act, as in an action, by a master for beating his servant, or a commoner for surcharging a common, in which the allegation *per quod servitium amisit*, or *per quod proficium communie sue habere non potuit* are material. So in an action for words not actionable in themselves, but becoming so only in respect of particular damage.<sup>f</sup> But the special damage must \*be the fair and natural result of the thing done, and not a mere wrongful act of a third person; for if a third person is guilty of a *tortious act* to the plaintiff, in consequence of the words, the defendant is not answerable for it; but the plaintiff must bring his action against such third person.<sup>g</sup> In *case* for words by reason of which the plaintiff was turned out of his lodgings and employment, it appeared that the defendant complained to *E.* the mistress of the house, (who was his tenant,) that her lodgers, of whom the plaintiff was one, behaved improperly at the windows, and he added that no moral person would like to have such people in his house; *E.* stated in her evidence that she dismissed the plaintiff in consequence of the words, not because she believed them, but because she was afraid it would offend her landlord, if the plaintiff remained.

The  
*scienter*.  
Statement  
of the da-  
mages.

\*599

<sup>a</sup> *Shears v. Wood*, 7 Moore, 345. (17 Eng. C. L. 76.) See *King v. Williamson*, 1 D. & R. N. P. C. 35. (16 Eng. C. L. 423.) 3 Stark. 162. (14 Eng. C. L. 175.)

<sup>b</sup> *Buxendin v. Sharp*, Salk. 662. Recognised by Lord Ellenborough, C. J. in *Jackson v. Pesked*, 1 M. & S. 238.

<sup>c</sup> *Hartley v. Harriman*, 1 B. & A. 620. 2 Stark. 214. (3 Eng. C. L. 318.)

<sup>d</sup> *Id.*

<sup>e</sup> *Thomas v. Morgan*, 2 C. M. & R. 496. 1 Gale, 172.

<sup>f</sup> 1 Saund. 346. B. N. P. 89. 1 Ch. Pl. 396. The loss of substantial benefit arising from the hospitality of friends, is a sufficient special damage if proved. *Moore v. Meagher*, 1 Taunt. 39.

<sup>g</sup> 1 Saund. 243, *d.* *Vicars v. Wilcocks*, 8 East, 1. See *Kelly v. Partington*, 5 B. & Ad. 648. (27 Eng. C. L. 144.)

Held, that the action was maintainable because the damage was sustained in consequence of the words.<sup>a</sup> But if the words be not in their nature defamatory, the special damage cannot be considered as the natural result of them.<sup>b</sup>

## SECTION XIV.

### OF THE PLEADINGS.

By Reg. Gen. H. T. 4 W. IV, in actions on the case, the plea of not guilty shall operate as a denial only of the *breach of duty or wrongful act* alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

\*600 Ex. gr. "In an action on the case for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not \*guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house.

"In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and in an action for converting the plaintiff's goods, the conversion only and not the plaintiff's title to the goods.

"In an action of slander of the plaintiff in his office, profession or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession or trade, but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged.

"In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

"In this form of action against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

"All matters in confession and avoidance shall be pleaded specially, as in actions of *assumpsit*."

<sup>a</sup> Knight v. Gibbs, 1 Ad. & Ell. 43. (28 Eng. C. L. 30.)

<sup>b</sup> Kelly v. Partington, 5 B. & Ad. 648. (27 Eng. C. L. 144.) See further as to this subject, title "Libel," Index.

In an action on the case for maliciously and without reasonable and probable cause procuring the plaintiff to be outlawed, it was held, that "not guilty," puts in issue the original debt and the probable cause for the proceeding, but not the reversal of the outlawry.<sup>a</sup> In an action for keeping a mischievous animal, the plea of "not guilty," denies the *scienter* as well as the injury.<sup>b</sup> In case for the diversion of water, not guilty puts in issue the fact of diversion only, and not the right to divert.<sup>c</sup> In an action for a malicious prosecution, not guilty puts in issue the want of probable cause as well as the fact \*of \*601 prosecution;<sup>d</sup> but not guilty does not put the inducement in issue.<sup>e</sup> Under a plea of not guilty to a nuisance, the plaintiff must not only prove the existence of the nuisance, but that the defendant was the person who caused it.<sup>f</sup> In an action on the case by a lodger for removing a water-closet, &c., the defendant cannot under a plea of not guilty show that the water-closet was useless before he removed it; but in mitigation of damages he may show that the plaintiff was a bad lodger, and that he did the act complained of to induce him to quit the house.<sup>g</sup>

Where in case against a sheriff for a false return of *nulla bona* to a writ of *fi. fa.*, the declaration alleged that the sheriff had levied on the goods of the debtor, and received the money; held, that the plea of not guilty put in issue, only, the fact of the sheriff having the money in his hands, and making the return alleged, and that it was not competent to him under that plea to set up the bankruptcy of the debtor before the execution of the writ.<sup>h</sup>

<sup>a</sup> Drummond v. Pigou, 2 Bing. N. C. 114. (29 Eng. C. L. 279.) 1 Hodg. 190.

<sup>b</sup> Thomas v. Morgan, 2 C. M. & R. 496. Gale, 172.

<sup>c</sup> Frankum v. Lord Falmouth, 4 N. & M. 330. 1 H. & W. 1. 6 C. & P. 529. (25 Eng. C. L. 526.) 2 Ad. & Ell. 452. (29 Eng. C. L. 140.)

<sup>d</sup> Cotton v. Brown, 3 Ad. & Ell. 312. (30 Eng. C. L. 100.) 4 N. & M. 831. 1 H. & W. 419.

<sup>e</sup> Dukes v. Gostling, 3 Dowl. 619. 1 Hodges, 120.

<sup>f</sup> Dawson v. Moore, 7 C. & P. 25. (32 Eng. C. L.) Abinger.

<sup>g</sup> Underwood v. Burrows, 7 C. & P. 26. (32 Eng. C. L.)

<sup>h</sup> Wright v. Lainson, 2 Mees & Wels. 739, ante, 238.



\*CHAPTER VII.  
COVENANT.

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SECTION I.

DEFINITION OF COVENANT.

Covenant must be by deed under seal. COVENANT is an agreement entered into by *deed* between two or more parties; for the breach of which an action of covenant will lie at the suit of the party injured, to recover damages for the loss which he has hereby sustained.<sup>a</sup> The agreement must be by *deed*, but it may be by deed indented, or deed poll.<sup>b</sup>(1) An action of covenant is of a technical <sup>a</sup>nature; it cannot be maintained except against a person, who by himself or some other person acting on his behalf has executed a deed under seal.<sup>c</sup> Covenants are express or implied.

<sup>a</sup> Com. Dig. Cov. A.  
<sup>b</sup> F. N. B. 340. Bac. Abr. 1. Roll. Ab. 517. Pl. 40.  
<sup>c</sup> Per Abbott, C. J., in *Burnett v. Lynch*, 5 B. & C. 602. (12 Eng. C. L. 330.) The chief justice added, “or who (under some very peculiar circumstances, such as those mentioned in Co. Litt. 231, a.) has agreed by deed to do a certain thing.” The  
(1) (Whether covenant will lie on a bond. *Huddle v. Worthington*, 1 Ohio, 195. *Abraham v. Kounts*, 4 Ohio, 214.)

## SECTION II.

## EXPRESS COVENANTS.

EXPRESS covenants are such as are created by the express words of the parties in a deed, declaratory of their intention.<sup>a</sup> There is no precise form of words necessary to constitute an express covenant;<sup>b</sup> any words contained in a deed expressive of an agreement between the parties will amount to a covenant.<sup>c</sup> \*As if a lessee for years covenants to repair, &c., “provided always, and it is agreed that the lessor shall find great timber,” &c. This makes a covenant on the part of the lessor to find timber.<sup>d</sup> But if the word *agreed* had been omitted, it would be only a qualification of the covenant of the lessee.<sup>e</sup> \*604

So covenant will lie on the words, “I oblige myself to pay so much money,” &c.;<sup>f</sup> so on the words of a bond, for they prove an agreement;<sup>g</sup> or, “I am content to give to *A.* ten pounds at Michaelmas, and ten pounds at Lady-day.”<sup>h</sup> So where *A. acknowledged himself* to be *accountable* to *B.* for all such moneys as should be charged by *B.* on *C.*, to be paid to *D.*; held, that an action of covenant would lie against *A.* or his representatives, as it might on any words in a deed pur-

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case in Co. Litt. is this, viz: If a lease be made to *A.* and *B.* by indenture, between the landlord of the one part, and *A.* and *B.* of the other part, and *A.* only execute it; but if *B.* agree thereto, and enjoy the premises by virtue of the demise, an *action* may be maintained against *A.* and *B.* jointly, upon a covenant therein running with the land, and purporting to be made by them.” This has been considered by some as an authority for the position, that in the above instance an action of *covenant* may be maintained against *A.* and *B.* See Com. Dig. Cov. A. 1. Co. Lit. by Thomas, vol. 2, 229, Dyer, 136. Pl. 66. 4 Cruis. Dig. 393. But this doctrine has been disputed with much appearance of reason by Mr. Platt in his treatise on covenants, p. 10 to 18, who, after reference to all the authorities, does not hesitate to assert that there is no instance of an action of *covenant* having been entertained by the courts against one claiming under a *deed-poll*, p. 16. But a covenantee without executing the deed may bring an action of covenant against the covenantor; for the right of suit is constituted by the covenantor’s execution of the deed. *Clement v. Hinley*, 2 Roll. Ab. 22. *Faite F.* Pl. 2. Com. Dig. Cov. A. 1. *Vernon v. Jeffreys*, 2 Stra. 1146. *Petrie v. Bury*, 3 B. & C. 353. (10 Eng. C. L. 108.) *Rose v. Poulton*, 2 B. & Ad. 822. (22 Eng. C. L. 191.) By special custom, covenant lies although the contract be not under seal in London. Com. Dig. London, N. 1. *F. N. B.* 166, *A.*, and *Bristol*, 1 Leon. 2. Covenant also lies against the lessee or patentee of the crown without executing the lease, it being matter of record, and the lessees’ acceptance of the demise being in such case as obligatory as an express covenant. Com Dig. Cov. A. 1 Cro. Jac. 240-399. Vin. Ab. Cov. B Pl. 1.

<sup>a</sup> Platt on Cov. 25.

<sup>b</sup> Bac. Ab. Cov. A. *Andrews v. Ellison*, 6 Moore, 199. (17 Eng. C. L. 24.) Per Parke, J., in *Carr v. Roberts*, 5 B. & Ad. 82; (27 Eng. C. L. 42;) by whatever words we collect an agreement that the thing should not be done, we collect enough to make an action of covenant maintainable for the doing of it. Per Lord Ellenborough, C. J., in *St. Albans (Duke of) v. Ellis*, 16 East, 355, *post*, 604.

<sup>c</sup> Bac. Ab. Cov. A.

<sup>d</sup> *Id.*

<sup>e</sup> 1 Roll. Ab. 518. C. Pl. 2. 2 Co. 72.

<sup>f</sup> *Norrice’s case*, Hard. 178.

<sup>g</sup> *Hill v. Carr*, 1 Ch. Cas. 294.

<sup>h</sup> 3 Leon, 119.

porting to be an agreement for the payment of money.<sup>a</sup> So covenant will lie upon these words, "I have in my possession a writing obligatory, and I will be ready at all times, when I shall be required to redeliver the same," &c.<sup>b</sup> So in a lease for years, the words *rendering* rent were held sufficient to constitute a covenant;<sup>c</sup> so the words "*yielding and paying*;"<sup>d</sup> and if the expressions used in the deed amount to an agreement, it will be sufficient to maintain covenant, even though the parties disclaim an intention to covenant, as where "they resolved and agreed, and did by way of declaration, and not of covenant, spontaneously and fully agree." Lord Eldon called this clause nonsensical.<sup>e</sup>

Words in the form of an exception may amount to a covenant. As where the lessee agreed to cultivate the premises demised, (*excepting the rabbit warren and sheep walk*), in a regular and due course of husbandry, &c.; held, that this amounted to a covenant not to plough the rabbit warren or  
 \*605 \*sheep walk.<sup>f</sup> So where the agreement was that the lessee should have wood *non succidendo arbores*; held to be a covenant by the lessee not to cut down the trees.<sup>g</sup> But where the agreement was that *A.* should convey to *B.* all his interest in a certain lease, except that *A.* should have every year 200 furze or wood faggots; held, that it did not amount to a covenant that *B.* should deliver the faggots; it was merely a liberty reserved by *A.* that he should take them on the land.<sup>h</sup> So where the demise is of land except a close, covenant will not lie for the disturbance of that close.<sup>i</sup> So where the agreement was to repair the demised premises, principal timber only excepted, the lessor was not obliged to deliver the timber, for the exception amounted to no more than that he was to provide it ready for the lessee to carry.<sup>j</sup> If a man lets a house, (excepting two rooms,) covenant does not lie for disturbing him in those rooms, because they were excepted, and not demised—*aliter*, if the lessee agrees to let the lessor have any thing out of the demised premises, such as a free passage into those rooms; a common or other profit *apprendre*.<sup>k</sup>

Where *A.* leased to *B.* for years, on condition that he should keep and have the houses at the end of the year in as good plight as he found them; held, that the lessee was liable

<sup>a</sup> *Brice v. Carre*, 1 Lev. 47. 1 Keb. 155.    <sup>b</sup> *Bac Ab. Cov. A.*

<sup>c</sup> *Giles v. Hooper*, Carth. 135. There is a difference of opinion whether these words constitute an express or an implied covenant. The cases on each side are collected in *Platt on Cov.* 50, et seq.

<sup>d</sup> *Porter v. Sweetman*, Sty. 406.

<sup>e</sup> *Ellison v. Bignold*, 2 J. & Walk. 510. *Pl. on Cov.* 29.

<sup>f</sup> *The Duke of St. Albans v. Ellis*, 16 East, 352.

<sup>g</sup> *Dyer*, 19, b.

<sup>h</sup> *Tuckerman v. Tuckerman*, Lut. 101. *Stevens v. Carrington*, 1 Doug. 27.

<sup>i</sup> *Russell v. Gulwell*, Cro. Eliz. 157. 11 Co. 506.

<sup>j</sup> *Brailsford v. Parsons*, Lutw. 95. 1 Show. 149. S. P.

<sup>k</sup> *Cole's case*, 1 Salk. 196. 12 Mod. 24. Carth. 232.

to an action of covenant for omitting to leave the houses in good plight.<sup>a</sup> But if a lease be granted "provided and on condition that the lessee collect and pay the rents of the other houses of the lessor;" this is not a covenant, because the words do not amount to an agreement, they are merely conditional to defeat the estate.<sup>b</sup>

An order or direction that other persons should pay a sum of money without words importing an agreement, do not constitute a covenant; as in the case of a policy of insurance, in these words, "We, the trustees and directors of the said Society, do order and direct the directors for the time being of the said Society, to raise and pay by and out of the moneys," &c.; held, not to amount to a covenant, it was a mere order for the payment of a sum of money under certain circumstances.<sup>c</sup> But where the directors of an insurance company declared in a policy, that in case of a loss by fire, the plaintiff would be entitled to receive remuneration out of the funds of the society; held, that covenant would lie, particularly as the directors had signed the policy, which distinguished it from the preceding case.<sup>d</sup>

The words of the covenant must import an agreement.  
\*606

### SECTION III.

#### IMPLIED COVENANTS.

THERE are some words which of themselves do not import an express covenant, yet being made use of in certain contracts, have a similar operation, and are called implied covenants, or covenants in law, and are as effectually binding on the parties as if expressed in the most unequivocal terms.<sup>e</sup>

As if a lease for years be made by any of the following words, *grant*, *demise*, *dimisi*, or *dimiserunt*, without any express covenant for quiet enjoyment, there is a covenant implied by law, on part of the lessor, that he had good title, and that the lessee shall quietly enjoy the premises until the end of the term. And if the lessee or his assignee be lawfully evicted by a person having a title paramount to the lease, an action of covenant may be maintained against the lessor.<sup>f</sup>

<sup>a</sup> Bac. Ab. Cov. A. Roll. Ab. 517.

<sup>b</sup> Geary v. Reason, Cro. Car. 128.

<sup>c</sup> Alchorne v. Saville, 6 Moore, 202, n. (17 Eng. C. L. 26.)

<sup>d</sup> Andrews v. Ellison, *id.* 199. (17 Eng. C. L. 24.)

<sup>e</sup> Bac. Ab. Cov. B.

<sup>f</sup> Bac. Ab. Cov. B. Iggulden v. May, 9 Ves. 330. Merrill v. Frame, 4 Taunt. 329. Coleman v. Sherwin, 1 Show. 79. 1 Salk. 137. Burnett v. Lynch, 5 B. & C. 609. (12 Eng. C. L. 327.) Deering v. Farrington, Freem. 367. The words *grant*, *bargain*, *sell*, *infer* and *confirm*, certainly import a covenant in law. Per Lord Eldon, C. J., in Browning v. Wright, 2 B. & P. 21. But whether the word *reddendum* will

\*607 So, where the lessor demised premises of which he was not seised, and which, therefore, he could not demise; held, that covenant could be maintained against him.<sup>a</sup> Where the defendant, being the proprietor of a certain medicine, assigned all his interest therein to the plaintiff, with authority to prepare, compound and sell the same in the name of the defendant, for the plaintiff's own benefit; held, to amount to a covenant in law on the part of the defendant that he should not himself vend, for his own profit, that which he had sold to the plaintiff, and that as he was afterwards concerned with others in vending the medicine on his own account he was guilty of a breach of covenant.<sup>b</sup>

So, where a lessee covenanted that he would at all times and seasons of burning lime supply the lessor and his tenants with lime at a stipulated price; held, that this was an implied covenant also that he would burn lime at all such seasons, and that it was not a good defence, that there was no lime burned out of the premises out of which the lessor could be supplied.<sup>c</sup> So, where the lessee covenanted that he should at all times during the term, fold his flock, which he should keep upon the demised premises upon such parts thereof upon which the same had been usually folded, under a certain penalty for every time the same should be folded off such parts; held, an implied covenant that the lessee should *keep* as well as fold a flock.<sup>d</sup> Where the master of a ship and the freighter, "covenanted and agreed that forty days should be allowed for unloading and loading again," &c.; held, to raise an implied covenant on the part of the freighter not to detain the ship for loading and unloading beyond the forty days.<sup>e</sup>

Implied covenants do not extend to things not in *esse* at the time of the demise. Therefore where *A.* in consideration that *B.* would build a mill upon the land, and a watercourse through the land, demised the land to *B.* by the words *dedi et concessi* and afterwards stops the watercourse, *B.* for the above reason cannot maintain covenant against *A.*<sup>f</sup>

\*608 A covenant for "the free use of the newly-intended road whenever the same may be made," will not apply to a road which, when the parties contracted, was newly intended to be made, but was executed and completed before the sealing of the covenant.<sup>g</sup>

The distinction

The distinction between express and implied covenants is, that express covenants are construed *more strictly*. A man

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support an action of covenant on a lease for life, is an unsettled point. *Harper v. Bird*, T. Jones, 102. 2 Lev. 206.

<sup>a</sup> *Holder v. Taylor*, Hob. 12. 1 Inst. 301.

<sup>b</sup> *Seddon v. Senate*, 13 East, 63.

<sup>c</sup> *Shrewsbury (Earl of) v. Gould*, 2 B. & A. 487.

<sup>d</sup> *Webb v. Plummer*, 2 B. & A. 746.

<sup>e</sup> *Randall v. Lynch*, 12 East, 179.

<sup>f</sup> *Huddy v. Fisher*, 1 Leon. 278.

*Crisp v. Price*, 5 Taunt. 548. (1 Eng. C. L. 183.)

may *without* consideration enter into an express covenant;<sup>a</sup> and as the heir cannot be named in an implied covenant, he cannot be bound thereby. But an executor is bound by the words, "*yielding and paying*;" his liability however will cease on the determination of the estate in respect of which the covenant arose.<sup>b</sup> Where an obligation is imposed by a rule of law, and there is no express covenant, the law introduces a reasonable exception, viz:—that an act of irresistible violence will excuse the party. But if a party enter into an absolute contract, without any qualification or exception, and receives from the party with whom he contracts the consideration for such engagement, he must abide by the contract, and either do the act or pay damages, his liability arising from his own direct and positive undertaking.<sup>c</sup>

between  
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and im-  
plied co-  
venants.

#### SECTION IV.

##### QUALIFIED COVENANTS.

THE generality of an implied covenant may be qualified by an express particular covenant, on the principle that "*expressum facit cessare tacitum*." As if one leases a house by the words *demise, grant, &c.*, and the lessor covenants that the lessee shall enjoy the premises during the term without eviction by the lessor, or any person claiming under him; in which case an action will not lie for an eviction by a person who has a prior \*title, for the implied covenant arising from the words *demise* and *grant* are restrained by the express covenant for quiet enjoyment and confined to evictions by the lessor of those claiming under him.<sup>d</sup> So where the defendant demised to the plaintiff a messuage, and covenanted that during the term he should have the use of the house in an adjoining yard jointly with the defendant, *whilst the same should remain there*, paying half the expense of keeping it in repair; held, that the words in italics qualified the general covenant; that an action would not lie against the lessor for removing the pump without reasonable cause.<sup>e</sup>

Qualified  
covenant  
for quiet  
enjoyment

\*609

But where one makes a lease for life by the words *dedi et concessi*, or by any other words reserving rent, in which case there is an

When

<sup>a</sup> Per Lord Mansfield, in *Shubrick v. Salmond*, 3 Burr. 1639. See *Lethbridge v. Mytton*, 2 B. & Ad. 772. (22 Eng. C. L. 181.)

<sup>b</sup> *Newton v. Osborn*, Sty. 387. *Swan v. Searles*, And. 12. *Dyer*, 257.

<sup>c</sup> Per Chambre, J., in *Beale v. Thompson*, 3 B. & P. 420. Adopting the rule laid down in *Paradine v. Jane*, Alleyn, 27, which was recognised by Lord Ellenborough, in *Atkinson v. Ritchie*, 10 East, 533, and in several cases therein mentioned.

<sup>d</sup> *Noke's case*, 4 Co. 80. *Merrill v. Frame*, 4 Taunt. 329.

<sup>e</sup> *Rhodes v. Ballard*, 7 East, 116.



express  
warranty  
in the  
deed.

the law makes a warranty against all men during the life of the lessor; in these cases an express warranty in the deed shall not qualify the implied warranty, but the lessee may make use of which of them he will, if he be evicted by one who hath an elder title.<sup>a</sup> An indenture of lease, containing a covenant by the lessee to repair the premises at all times, (as often as need or occasion should require,) and "at farthest within three months after notice," is one entire covenant, the former part of which is qualified by the latter.<sup>b</sup> So where covenants in an indenture of sale, "that the covenantors were seised of a good estate in fee simple, and good right, &c. to convey;" held, to be qualified, and restricted by a subsequent covenant for quiet enjoyment, "without let, &c. by them, their heirs, or other persons claiming under them."<sup>c</sup> So where the assignor of a lease covenanted "that he had not at any time done or suffered any act or thing, whereby the premises intended to be assigned could be impeached or affected in title or estate, and that for and notwithstanding any such act, &c., the lease was a good, valid, and subsisting lease, and not forfeited, surrendered, or become void; and that he had in himself good right, full power and authority, to grant, assign, transfer, and set over the same, to the assignee, in manner aforesaid; then followed a covenant  
\*610 for further assurance by the \*assignor, and all persons claiming under him; held, that the general words, that the assignor had full power to grant, assign, and set over, were restrained by the preceding part of the covenant, and therefore that such covenant was confined to the act of the assignor alone.<sup>d</sup>

So, where the assignor covenanted that for and notwithstanding any act or thing by him done, the lease was valid, and further, that it should be lawful for the assignee at all times, during the term, quietly to enjoy, without the lawful let or interruption of the assignor, his executors, administrators, or assigns, or any of them, or any other person or persons whomsoever claiming any estate or right in the premises, and that clearly discharged by the assignor, his heirs, executors, or administrators, from all former incumbrances made or suffered by him, or by their or either of their acts or privity; and then followed a covenant for further assurance by the assignor, his executors and administrators, and all persons whomsoever claiming under him; held, that the general words in the covenant for quiet enjoyment, were restrained by the restrictive words in the covenant for title and further assurance, which preceded and followed it, and therefore that such covenant was confined to the acts of the covenantor, and those claiming under him.<sup>e</sup> So where *A.* having granted land, &c., to the plaintiff in fee,

<sup>a</sup> Shep. Touch. 165.

<sup>b</sup> Horsfall v. Testar, 1 Moore, 89. 7 Taunt. 385. (2 Eng. C. L. 146.)

<sup>c</sup> Milner v. Horton, M'Clel. 647. But see Smith v. Compton, *post*, 612.

<sup>d</sup> Foord v. Wilson, 2 Moore, 592. (4 Eng. C. L. 205.)

<sup>e</sup> Nind v. Marshall, 3 Moore, 703. 1 B. & B. 319. (5 Eng. C. L. 95.)

and warranted the same against himself and his heirs, covenanted, "that notwithstanding any act by him done to the contrary, he was seised of the premises in fee, and *that he had full power, absolute authority, &c. to convey the same;*" he then covenanted for himself, his heirs, &c., to make a cart-way, and that the plaintiff should quietly enjoy without interruption from himself or any person claiming under him, and lastly, "that he, his heirs, assigns, and all persons claiming under him should make further assurance;" held, that the words in italics were either part of the preceding special covenant, "that notwithstanding any act by him to the contrary he was seised of the premises in fee;" or if not that they were qualified by all the other special covenants to the acts of himself and his heirs; \*for the fair inference from the whole was that *A.* intended to sell what he had bought, leaving it to the purchaser to exercise his discretion respecting the title.<sup>a</sup> So where *L.* being possessed of a term of years, provided *C.* should so long live, assigned the term, and covenanted "that *notwithstanding any act done by him, the lease was at the time of the assignment valid and effectual* and that the term of eleven years therein expressed, *was in full force and in no wise determined*, or prejudicially affected otherwise than by effluxion of time, and also, that notwithstanding any act he had full power to assign, &c.;" before the assignment *C.* had died, and *L.* knew that fact; held, on the authority of the preceding case, that the covenant respecting the lease was qualified by the words in italics, and restricted to acts done by *L.*, and that therefore he was not liable upon this covenant, for an eviction by the party entitled on *C.*'s death.<sup>b</sup> \*611

But where the releasors covenanted that, "for and notwithstanding any act, &c., by them, or any or either of them done to the contrary, they had good title to convey certain lands in fee; and also, that they or some or one of them, for and notwithstanding any such matter or thing as aforesaid, had good right and full power to grant, &c.; and likewise that the releasee should peaceably and quietly enter, hold, and enjoy the premises granted without the lawful let or disturbance of the releasors or their heirs or assigns, or for or by any other person or persons whatsoever; and that the releasee should be kept harmless and indemnified by the releasors and their heirs, against all other titles, charges, &c., save and except the chief rent issuing and payable out of the premises to the lord of the

<sup>a</sup> *Browning v. Wright*, 2 B. & P. 13.

<sup>b</sup> *Stannard v. Forbes*, 1 Nev. & Perr. 633. It appeared also in this case, that after the death of *C.*, *L.* paid rent to the party entitled on that event, and it was contended on behalf of the plaintiff, that as the payment of rent would have the effect of converting the term into a yearly tenancy, if done while the life continued, and could have no less effect after the life had dropped; and therefore that it was an act done by *L.* to forfeit his lease. But the court held, that the payment of rent made no difference whatever in *L.*'s interest, which had previously expired; what he did was wholly inoperative, and could not therefore be a breach of his covenant. *Id.*

\*612 fee;" the court held that the generality of the covenant for quiet enjoyment "against "the releasors and their heirs, and any other person or persons whatsoever," was not restrained by the qualified covenants for good title and right to convey "for and notwithstanding any act done by the releasors to the contrary."<sup>a</sup> Where a lessee covenanted "to leave premises in repair at the expiration of the term, and also that the lessors might direct the lessee to complete the repairs, by giving six months' notice in writing;" held, that these were two distinct and separate covenants, the former of which was not qualified by the latter.<sup>b</sup> Covenant by the assignor of certain shares in a patent right that he had good right, full power, and lawful authority to assign and convey the said shares, and that he had not by any means, directly or indirectly, forfeited any right or authority he ever had or might have over the same; held, that the generality of the former words of the covenant was not restrained by the latter.<sup>c</sup>

Where by indenture reciting a power vested in *A. B.* to dispose of certain premises, and that *C. D.* had contracted to purchase them, *A. B.* appointed and conveyed them to the use of *C. D.* and his heirs, &c., and covenanted that the power then in *A. B.* was then in force and not executed, and also that he *A. B.* had in himself a good right, title, power, and authority to limit and appoint, and to grant, &c., the premises to the said uses, and further that the said premises should be held and enjoyed to the said uses, without the let or interruption of *A. B.*, or any claiming under or in trust for him, and also for further assurance by *A. B.* and all so claiming; held, that the second covenant was absolute for good title against all persons, and not to be qualified by reference to the other covenants, inasmuch as there were no words either in the second covenant itself, or in preceding or subsequent ones to connect it with them. "There is only one case,"<sup>d</sup> said Lord Tenterden, C. J., in delivering the judgment of the court, "where a general covenant has been held to be qualified by others, unless in some way connected with them. We have considered that case, and we cannot feel ourselves bound by its authority.

\*613 The covenant declared upon "being unqualified in itself, and unconnected with any words in the qualified covenants, must, therefore, in a court of law be regarded as an absolute covenant."<sup>e</sup>

<sup>a</sup> Howell v. Richards, 11 East, 633.

<sup>b</sup> Wood v. Day, 1 Moore, 389. 7 Taunt. 646. (2 Eng. C. L. 245.)

<sup>c</sup> Hessee v. Stevenson, 3 B. & P. 565. <sup>d</sup> Milner v. Horton, *ante*, 609.

<sup>e</sup> Smith v. Compton, 3 B. & Ad. 189. (23 Eng. C. L. 55.)

## SECTION V.

## OF THE CONSTRUCTION OF COVENANTS.

IN the construction of covenants the following rules, collected from the authorities, may be found useful.

*First.* Where the covenant is *express*, there must be an absolute performance, nor will it be discharged by any collateral matter whatsoever. As if a lessee covenant to pay rent, and the premises be rendered uninhabitable by being totally burned down, or through any other cause, he will continue liable to pay the rent during the term, though he have no enjoyment of the premises, for he is bound by his *express covenant*.<sup>a</sup> And even if the landlord be bound to rebuild the premises, and neglect to do so, it will be no answer to an action for the rent, because the damages arising to the lessee from such negligence are unliquidated.<sup>b</sup>

It was formerly supposed that, under such circumstances, the lessee might obtain relief in equity against the claim of the landlord, on the ground that he could have no enjoyment of the premises.<sup>c</sup> But it is now settled that, under such circumstances, the tenant is entitled to no relief in equity. "If," said Lord Eldon, "the meaning of the contract be, that if a fire should happen the rent shall not be paid, there is no occasion to come into equity; but if that is not the effect of the contract at law, I cannot see any equity."<sup>d</sup>

The *second* rule is, that covenants are to be so expounded as \*to carry into effect the intention of the parties, and this intention is to be collected from the whole context of the instrument, so as to make one entire and consistent construction of the whole.<sup>(1)</sup> The exposition must be upon the whole instrument *ex antecedentibus et consequentibus*, and according to the reasonable sense and construction of the words. In conformity to which rules, and in support of the apparent intention of the parties, covenants in large and general terms have been frequently narrowed and restrained.\*

Second rule.

\*614

<sup>a</sup> *Belfour v. Weston*, 1 T. R. 310. *Pindar v. Ainsley*, cited *id.* *Monk v. Cooper*, 2 Stra. 763. 2 Lord Raym. 1477. *Carter v. Cummins*, 1 Ch. Cas. 84. *Paradine v. Jane*, Al. 27.

<sup>b</sup> *Monk v. Cooper*, *supra*. *Weigall v. Waters*, 6 T. R. 488.

<sup>c</sup> *Brown v. Quilter*, Ambl. 619, cited 1 T. R. 708. *Steele v. Wright*, *id.* *Campden v. Moreton*, 2 Eden, 219. *Sergt. Hill's MSS.* vol. 10, 403. *Harrison v. Lord North*, 1 Ch. Cas. 83.

<sup>d</sup> *Holtzappell v. Baker*, 18 Ves. 115. *Leeds v. Cheetham*, 1 Sim. 146. *Hare v. Groves*, 3 Anstr. 687.

\* Per Lord Ellenborough, in *Sicklemore v. Thistleton*, 6 M. & S. 12, (recognising *Brown v. Wright*, 2 B. & P. 13,) and in *Iggulden v. May*, 7 East, 241, (where he cites *Plowd.* 329.) See also, as to this position, *Doe v. Godwin*, 4 M. & S. 265.

(1) (*Watchmen v. Crook*, 5 Gill & Johns. 233. *Ladlow v. McCrea*, 1 Wend. 228.)

To be performed according to the intent.

Therefore, if a person performs a covenant according to the letter, and does any act to defeat its intent, it is not a legal performance. As where *A.* covenanted that *B.* should have all the grains made in *A.*'s brewhouse for seven years, (the intent of the parties being that *B.* should have the grains for the use of his cattle,) it was held, that, by mixing hops with the grains, whereby they were spoiled, *A.* was guilty of a breach of covenant.<sup>a</sup> So if I covenant that I will leave all the timber which is growing on the land I hire upon the land at the end of the term, and then cut it down, though I leave it on the land; or if I covenant to deliver so many yards of cloth, and I cut it in pieces and then deliver it, my covenant is broken: for the law regards the real and faithful performance of contracts, and discountenances all such acts as are in *fraudem legis*.<sup>b</sup>

When once performed it will be discharged.

But if the covenant be once duly performed, the covenantor will be discharged, though the performance be defeated by a subsequent act. As if I covenant that an infant shall levy a fine, which is levied accordingly, but afterwards reversed for error, it is a sufficient performance; or if I covenant that *A.* shall marry *B.*, both being infants, and the marriage is solemnised, \*and when *A.* comes of age, he disagrees to the marriage, I am discharged, for my covenant only extended to the marriage.<sup>c</sup>

\*615

A covenant by a party, that so long as the defendant should continue and be in the actual receipt of the profits of a rectory, he would pay a yearly sum during the life of the rector, by two half-yearly payments, must be construed as a covenant for the payment of such yearly sum whilst the covenantor is in receipt of the profits during the life of the rector, and not whilst he is merely in receipt of the profits.<sup>d</sup>

Third rule

The *third* rule is, that when ambiguous expressions are used, or where the sense of the words is in *equilibrio*, they are to be taken most strongly against the covenantor. The maxim being *verba chartarum fortius accipiuntur contra proferentem*.<sup>e</sup> As where the defendant covenanted with *B.*, that if he married his daughter he would pay *B.* 20*l.* per annum, without saying *how long*, it was held, that it should be during the life of *B.*, and not for one year only, for such construction would be most strongly against the covenantor.<sup>f</sup>

Foord v. Wilson, 5 Taunt. 547. (4 Eng. C. L. 205.) Barton v. Fitzgerald, 15 East, 541. Bish v. Keeling, 1 M. & S. 545. The Duke of Northumberland v. Errington, 5 T. R. 526. Glazebrook v. Woodrow, 8 T. R. 370. Trenchard v. Hoskins, Winch. 93, cited 6 M. & S. 14. Per Tindal, C. J., in Stavers v. Curling, 3 Bing. N. C. 368. (32 Eng. C. L.)

<sup>a</sup> Griffith v. Goodhand, T. Raym. 464. Skin. 39. T. Jones, 191.

<sup>b</sup> *Id.* See also, as to this position, Cro. Eliz. 7. Robinson v. Aunts, 1 Sid. 48.

<sup>c</sup> Leigh v. Hanner, 1 Leon. 52.

<sup>d</sup> Combe v. Jones, 2 Chitty, 700.

<sup>e</sup> Per Bayley, J., in Fowle v. Welsh, 1 B. & C. 35, (8 Eng. C. L. 18,) and in Love v. Pares, 13 East, 86. See also Rubery v. Jervoise, 1 T. R. 234. Earl of Shrewsbury v. Gould, 2 B. & A. 494.

<sup>f</sup> Hookes v. Swaine, 1 Sid. 151. 1 Lev. 102. 1 Keb. 511.

The *fourth* rule is, that the deed shall be construed so as to support rather than defeat the transaction; *ut res magis valeat quam pereat*.<sup>a</sup> Fourth rule.

The *fifth* rule is, that when no time is limited for the doing of a thing, it shall be done in a reasonable time; as if *A.*, in consideration that *B.* will marry a certain woman within a certain time, covenants to pay *B.* ten pounds, and to find security for the payment of forty pounds more on his (*A.*'s) death, a convenient time will be allowed to *A.* for finding the security.<sup>b</sup> Fifth rule.

Where a lease contained a proviso giving power of re-entry, "if the tenant *make default* in performance of any of the clauses by the space of thirty days *after notice*;" the proviso was held, not to apply to the breach of a covenant not to allow alterations in the premises or permit new buildings to be made \*on them without permission; and the tenant having erected a portico contrary to the covenant, and notice having been given to him to replace the premises in their former state, which he neglected to do for thirty days, it was held that no forfeiture was incurred. "The general rule is," said Lord Tenterden, "that a clause of re-entry shall be construed strictly; that the lessor may re-enter seems properly applicable to affirmative covenants. But it cannot be supposed that the parties anticipated a thirty days' notice being given not to raise the wall, or vary from the original plan of the premises. It is quite different where the notice required is to do some act."<sup>c</sup> So a proviso in a lease giving power of re-entry, if the lessee "shall do or cause to be done any act, matter, or thing contrary to, and in breach of any of the covenants," was held, not to apply to a breach of the covenant to repair. Per Lord Tenterden, C. J., "It is a general rule of construction that the words of a covenant must be taken most strongly against the covenantor; and that rule applies more strongly to a proviso for re-entry which contains a condition that destroys or defeats the estate. The words *do or cause to be done* import an act, and there is nothing in the other parts of the instrument from which we can clearly collect, that it should apply to an omission to do an act. We are, therefore, of opinion that the mere omission to repair cannot be considered as doing or causing to be done, an act within the meaning of the clause for re-entry."<sup>d</sup> Covenant to do an act after notice, is not broken by doing a prohibited act. \*616

A covenant to do an act is not broken by an omission to do an act.

Where a covenant to repair, is to keep and leave the house in as good a plight as it was at the time of making the lease, the covenantor is only bound to do his best to keep it in that plight, and therefore to keep it covered. The ordinary and natural decay is no breach.<sup>e</sup> So where the covenant was to Covenant to repair is not broken by ordinary decay.

<sup>a</sup> Shep. Touch. 166.

<sup>b</sup> Peeter v. Carter, 1 Rol. Ab. 438.

<sup>c</sup> Doe d. Palk v. Marchetti, 1 B. & Ad. 715. (20 Eng. C. L. 480.) A negative covenant cannot be said to be performed until it becomes impossible to break it. See Hamlock v. Blacklowe, 2 Saund. 156. 1 Sid. 164. Co. Litt. 303, b.

<sup>d</sup> Doe d. Abdy v. Stevens, 3 B. & Ad. 299. (23 Eng. C. L. 75.)

<sup>e</sup> Shep. Touch. 169. The tenant is not liable for such dilapidations as result from the natural operation of time and the elements. Gutteridge v. Manyard, 1 M. & Rob. 334. 7 C. & P. 129. (32 Eng. C. L.) Tindal.



It implies  
substan-  
tial repair.  
\*617

It is not  
broken by  
making an  
alteration.

keep the premises in good and substantial repair and condition, Tindal, C. J., held, that the defendant was only bound to keep up the house as an old house; and not to give the plaintiff the benefit of new work; keeping the premises in substantial repair, was a sufficient compliance with the covenant.<sup>a</sup> Where a lease contained a covenant to keep the premises and all such buildings and improvements as should be made during the term in repair, with a clause of re-entry; it was held, that no forfeiture was incurred by the lessee's changing the lower windows into shop windows, and stopping up a doorway; for the covenant was only against *non-repair*, and it contemplated improvements.<sup>b</sup> Where a party agreed for an under-lease, and took possession of the premises, his attorney having an opportunity of inspecting the original lease; it was held, that the under lessee was bound to accept a lease with the covenants in the original lease, although of an unusual nature, it being his duty to inform himself thereof; and a specific performance was decreed with costs.<sup>c</sup>

Cove-  
nants in  
restraint  
of trade  
are not  
usual co-  
venants.

Upon a covenant in a lease of a colliery for payment of one-third of the money arising from the sale of coals raised and sold, coupled with another to keep true accounts of all the coals raised, and to deliver true copies to the lessor; held, that the valuation must be made on the account of coals sold, and not of the money actually received.<sup>d</sup> Upon an agreement for a lease with the usual covenants, and one that the premises should not be converted into a school; held, that the former were not to be extended into covenants in restraint of trade, and that it was immaterial whether the lessee had notice of the nature of the lessor's own tenure.<sup>e</sup>

Where the defendant covenanted that he had not done nor permitted, nor suffered to be done any act, whereby an estate was encumbered; it was held, that assenting to an act, which he could not prevent, was not a breach of the covenant; for the meaning of the words, "permit and suffer," was that the defendant should not concur in any act over which he had control.<sup>f</sup>

<sup>a</sup> Harris v. Jones, 1 M. & Rob. 173.

<sup>b</sup> Doe d. Dalton v. Jones, 4 B. & Ad. 126. (24 Eng. C. L. 37.)

<sup>c</sup> Cosser v. Collinge, 3 Myl. & Keen, 283.

<sup>d</sup> Edwards v. Rees, 7 C. & P. 340. (32 Eng. C. L.)

<sup>e</sup> Van v. Corpe, 3 Myl. & K. 269. Propert v. Parker, *id.* 280.

<sup>f</sup> Hobson v. Middleton, 6 B. & C. 295. (13 Eng. C. L. 175.)

## \*SECTION VI.

## PERSONAL COVENANTS.

COVENANTS are also real and personal.

A personal covenant relates only to the person, and is binding on the covenantor during his life; and on his personal representatives after his decease, in respect of assets. It is distinguishable from a real covenant, inasmuch as the latter may run with the land, and be a charge on an assignee, even though unnamed; whereas a personal covenant does not run with the land, nor will it bind an assignee even though named in it.<sup>a</sup> If the covenantor covenants for himself and *his heirs*, it is then a covenant real, and descends upon the heirs, who are bound to perform it, provided they have assets by descent, but not otherwise; if he covenants also for his *executors and administrators*, his personal assets as well as his real are likewise pledged for the performance of the covenant.<sup>b</sup> And even if his executors or administrators be not named therein, they are bound in respect of assets, unless it be such a covenant as is to be performed personally by the covenantor before his death.<sup>c</sup>

A personal covenant is binding on the covenantor and his personal representatives only. For self and heirs.

A covenant to pay a sum of money in gross, or to build a house on the land of a third person, is a personal covenant.<sup>d</sup> So, if a man lease sheep or any thing personal, and the lessee covenant for himself and "his assigns" at the end of the term to deliver up the sheep or things so let, or to pay such a price for them; if the lessee assign the sheep the covenant will not bind the assignee, for it is a personal covenant, and there is no privity between the assignee and the lessor.<sup>e</sup>

The lessees of a theatre, by deed under seal, agreed to repay certain money lent to them by the plaintiff, on a day certain, and that until payment, the plaintiff, and such persons as he might appoint, should have the free use of two boxes in the theatre, one in the dress circle and one in the circle above, no specific boxes being mentioned. The lessees afterwards assigned their interest in the theatre to the defendant. Held, that \*this was a mere personal contract, and that no action could be maintained against the assignee for refusing to permit the plaintiff to use the boxes in the theatre.<sup>f</sup>

\*619

One who covenants for himself, his heirs, &c., and under his own hand and seal, for the act of another, shall be personally bound by his covenant, though he describe himself in the deed as covenanting for and on the part and behalf of such other person.<sup>g</sup>

<sup>a</sup> Spencer's Case, 5 Co. 16, b.

<sup>b</sup> 2 Bl. Com. 304.

<sup>c</sup> Cooke v. Calcraft, 2 Bl. 856. Cro. Eliz. 553. Shep. Touch. 179.

<sup>d</sup> Spencer's Case, *supra*.

<sup>e</sup> *Id.* See Milnes v. Branch, 5 M. & S. 411. Splidt v. Bowles, 10 East, 279.

<sup>f</sup> Flight v. Glossop, 1 Hodges, 263. 2 Bing. N. C. 125. (29 Eng. C. L. 279.)

<sup>g</sup> Appleton v. Binks, 5 East, 148. 1 Smith, 361.

The directors of a joint stock company were held personally liable for the payment of the purchase-money of the mines, on an agreement under seal, which they had entered into as directors of the company though they had not received subscriptions from the proprietors, and though they had covenanted to pay the money out of those subscriptions.<sup>a</sup>

Where *B.*, being seised in fee, conveyed to the defendant and *J.*, their heirs and assigns, to the use that *B.*, his heirs and assigns, might have a rent out of the premises, and subject thereto, to the use of the defendant in fee; and the defendant covenanted with *B.*, his heirs and assigns, to pay *B.*, his heirs and assigns, the rent, and to build within a year one or more messuages on the premises for securing the rent; *B.* within a year demised the rent to the plaintiff for 1000 years; held, that the plaintiff could not maintain covenant either for the non-payment of the rent or for not building the messuages; for the covenant did not run with the rent, and there was neither privity of contract nor privity of estate. It was a covenant in gross.<sup>b</sup>

## SECTION VII.

### COVENANTS WHICH RUN WITH THE LAND.

A COVENANT which has for its object something annexed to, or inherent in, or connected with real property, such as a covenant for quiet enjoyment, for repairs, for payment of rent,  
 \*620 \* &c., runs with the thing demised, and the assignee, though not named therein, is bound thereby and entitled to the advantages of it.<sup>c</sup>(1)

<sup>a</sup> *Hancock v. Hodgson*, 4 Bing. 269. (13 Eng. C. L. 428.)

<sup>b</sup> *Milnes v. Branch*, 5 M. & S. 411.

<sup>c</sup> *Spencer's Case*, 5 Co. 17. *Bally v. Wells*, Wilmot's Notes, 344. *Vernon v. Smith*, 5 B. & Al. 1. (7 Eng. C. L. 3.) *Lewis v. Campbell*, 3 Moore, 35. 8 Taunt. 715. (4 Eng. C. L. 258.) See also *Keppel v. Bailey*, 2 Myl. & Keen, 517. "There is no authority for saying that the burden of a covenant will run with the land, in any case, except that of landlord and tenant, while the opinion of Lord Holt, in *Brewster v. Kitchin*, 1 Lord Raym. 318, and that of Lord Brougham, in *Keppel v. Bailey*, *supra*, and the reason and inconveniences of the thing, all militate the other way." Smith's Leading cases, 38.

(1) (For cases respecting covenants, which run with the land, see *Wheelock v. Thayer*, 16 Pick. 68. *Plymouth v. Carver*, *Ibid.* 183. Covenants to repair and rebuild on the land, are covenants running with the land; and so is a covenant to effect insurance, and apply the proceeds, in case of loss by fire, to the reparation of the insured property. *Thomas v. Vonkayff*, 6 Gill & Johns. 372. Where a covenant running with the land is divisible in its nature, if the entire interest in different parcels of the land passes by assignment to separate individuals, the covenant will attach upon each parcel *pro tanto*. *Astor v. Miller*, 2 Paige, 68. A covenant not to erect a building on a public or common square, owned by the grantor in front of the

A covenant in a lease that the lessee, his executors and administrators, &c., shall constantly reside on the demised premises during the demise, runs with the land.<sup>a</sup> So, a covenant in a lease by the lessor to supply two houses with good water at a certain rate.<sup>b</sup> So, a covenant to insure premises against fire which are situate within the weekly bills of mortality, as specified in the statute 14 Geo. III, c. 78, runs with the land.<sup>c</sup> A covenant to carry all the corn produced on the demised land to the lessor's mill to be ground, runs with the land whilst the ownership of the mill and the land are in the same person.<sup>d</sup> So, a covenant by the lessee of a mine, to build a smelting house on a waste not demised and not belonging to the lessor, but upon which the lessor was empowered to erect buildings requisite for working the mine, has been held to run with the land, for it tended to support the maintenance of the thing demised.<sup>e</sup> A covenant by a lessee of tithes, for himself and assigns, not to let any of the farmers in the parish have any part of his tithes, runs with the tithes and binds the assignee.<sup>f</sup>

It may here be observed, that in order to make a covenant run with the land, the performance or non-performance of it must affect the nature, quality, or value of the property conveyed, independently of collateral circumstances, or must affect the mode of enjoying it; therefore, where in a lease of \*pre-  
 mises, with liberty to erect a mill, the lessee covenanted for himself and assigns not to have persons to work in the mill who were settled in other parishes, without a parish certificate, it was held that this covenant did not run with the land or bind his assignee.<sup>g</sup> And there must also be a privity of estate between the contracting parties.<sup>h</sup> As where a mortgagor and mortgagee made a lease for years, and the lessee covenanted with the mortgagor to pay the rent and keep the premises in repair; it was held that, as the mortgagor had no interest in the land of which a court of law could take notice, the covenants were merely collateral and did not run with the land, so as to enable the assignee of the mortgagee to take advantage of them.<sup>i</sup>

Covenants which concern some collateral thing and do not immediately relate to the thing demised, as a covenant to

<sup>a</sup> *Tatem v. Chaplin*, 2 H. Bl. 133.

<sup>b</sup> *Jourdain v. Wilson*, 4 B. & A. 266. (6 Eng. C. L. 420.)

<sup>c</sup> *Vernon v. Smith*, *supra*.

<sup>d</sup> *Vyvyan v. Arthur*, 1 B. & C. 410. (8 Eng. C. L. 113.)

<sup>e</sup> *Sampson v. Easterby*, 9 B. & C. 505, (17 Eng. C. L. 428,) in Error, 6 Bing, 644. (19 Eng. C. L. 188.) 1 C. & J. 105.

<sup>f</sup> *Bally v. Wells*, 3 Wills. 25.

<sup>g</sup> *Mayor of Congleton v. Pattison*, 10 East, 130.

<sup>h</sup> *Sugd. Ven. & Pur.* 544.

<sup>i</sup> *Webb v. Russell*, 3 T. R. 393.

premises conveyed, is a covenant running with the land. *Watertown v. Cowen*, 4 Paige, 510. A covenant of warranty runs with the land, and the assignee may sue in his own name. *Suydam v. Jones*, 10 Wend. 180.)

some col-  
lateral  
thing does  
not run  
with the  
land.

pay a sum of money in gross, to build a house on another man's ground, to make a feoffment or lease of other land, or that the lessor shall distrain for rent in some other land than that which is demised, or the like, is a collateral covenant which does not run with the land.<sup>a</sup> And of this description is a covenant by the lessee of a mortgagor and mortgagee to pay the rent, &c.;<sup>b</sup> by a mortgagor with the mortgagee to pay the mortgage money;<sup>c</sup> by the lessee of a public-house to account and pay such a sum for every tun of wine sold in the house.<sup>d</sup> So a covenant by lessee with the lessor to indemnify the parish in which the premises were situate from all expenses, by reason of the lessee's taking an apprentice or servant who should thereby gain a settlement, was held not to run with the land.<sup>e</sup>

Where the lessees of a theatre covenanted to repay a sum of money lent to them by the plaintiff, on a day certain, and that the plaintiff should have the use of two boxes in the theatre in the intermediate time gratuitously, and the lessees afterwards assigned their interest in the theatre; held, not to be a covenant running with the land, and therefore that an action could  
\*622 \*not be sustained against the assignees of the theatre for refusing to let the plaintiff have the use of the boxes for the plaintiff had no interest in any specific part of the theatre, but a mere license to use two boxes, which were not particularly pointed out: there was no privity of estate or privity of contract between him and the assignees.<sup>f</sup>

A covenant by the lessor to pay on a valuation for all trees planted by the lessee, does not run with the land.<sup>g</sup> So a covenant by a lessee, that he, his executors and administrators shall not assign without license has been held not to run with the land.<sup>h</sup>

## SECTION VIII.

### COVENANTS FOR QUIET ENJOYMENT.

A general  
covenant  
for quiet  
enjoyment  
extends

A COVENANT for quiet enjoyment is an assurance against the consequences of a defective title and of any disturbance thereupon. For the purpose of this covenant and the indemnity it affords, it is immaterial, when framed in general terms, in what

<sup>a</sup> Shep. Touch. 161. Platt. 69.

<sup>b</sup> Webb v. Russell, 3 T. R. 393.

<sup>c</sup> Canham v. Rust, 8 Taunt. 227. (4 Eng. C. L. 80.)

<sup>d</sup> Anon. Godb. 120.

<sup>e</sup> Walsh v. Fussell, 6 Bing. 163. (19 Eng. C. L. 40.)

<sup>f</sup> Flight v. Glossop, 2 Bing. N. C. 125. (29 Eng. C. L. 279.) 1 Hodges, 263.

<sup>g</sup> Grey v. Cuthbertson, 2 Chitty, 482. (18 Eng. C. L. 397.) 4 Doug. 351. (26 Eng. C. L. 398.)

<sup>h</sup> Paul v. Nurse, 8 B. & C. 486. (15 Eng. C. L. 273.)

respects, and by what means, or by whose acts, the eviction of only to a the grantee takes place, so that he be lawfully evicted; the disturb- grantor by such his covenant stipulates to indemnify him at all ance un- events.<sup>a</sup> A general covenant for quiet enjoyment was in der a law- earlier times holden to extend to tortious evictions or inter- ful title. ruptions; but a different rule is now established, so that at present, when we speak of a covenant providing against the acts of all men, it is to be understood of all men claiming by title, for the law will not adjudge that the wrongful acts of strangers are covenanted against. Hence, if one who has no right ousts or disseises a purchaser, the latter shall not have an action of covenant against the vendor. The reason being that the law has already furnished the means of redress by giving the injured party an action of trespass against the wrong doer.<sup>b(1)</sup>

\* But a covenant against the acts of a particular person by name will not be restrained to disturbances by title; for the co- name 623 venantor is presumed to know the individual against whose Against the acts of acts he is content to covenant, and may therefore be reasona- a particu- bly expected to stipulate against any disturbance by him, whe- lar person. ther by lawful title or otherwise.<sup>c</sup> So a covenant for enjoy- ment against all claiming or *pretending to claim* any right, Against all claim- will extend to all interruptions, legal or illegal, as it evinces an ing. intention in the parties that the covenantee should be protected against tortious as well as rightful claims.<sup>d</sup>

In order to support an action on a covenant for quiet enjoy- Entry ment, the entry must be made under an assumption of title; must be therefore, an accidental trespass in hunting will not be deemed under as- a breach.<sup>e</sup> But it is not necessary that the party making the sumption of title. claim should *have a title*, it is sufficient if he does the act *un- der a claim* of title.<sup>f</sup> But the plaintiff may state generally that *A.*, lawfully claiming the title under the defendant, entered by virtue of such title on the premises, without setting forth the particulars of *A.*'s title.<sup>g</sup>

It has been decided that a person taking under an execution Taking of a power of appointment is within a covenant for quiet en- under

<sup>a</sup> Howell v. Richards, 11 East, 642. Norman v. Foster, 1 Mod. 101. Platt on Cov. 312.

<sup>b</sup> Crosse v. Young, 2 Show. 425. Hamond v. Dod. Cro. Car. 5. Holmes v. Seller, 3 Lev. 305. Platt on Cov. 313. Dudley v. Folliott, 3 T. R. 584. Noble v. King, 1 H. Bl. 34. Nash v. Palmer, 5 M. & S. 379. Campbell v. Lewis, 3 B. & A. 396. (5 Eng. C. L. 322.) Griffith v. Brome, 6 T. R. 66.

<sup>c</sup> Foster v. Mapes, Cro. Eliz. 212. Perry v. Edwards, 1 Stra. 400. Nash v. Palmer, 5 M. & S. 374. Fowle v. Welsh, 1 B. & C. 29. (8 Eng. C. L. 16.) Platt on Cov. 317. Shep. Touch. 166.

<sup>d</sup> Southgate v. Chaplin, Comyn, 230. 10 Mod. 383. Lucy v. Levington, 1 Vent. 175. 2 Lev. 26.

<sup>e</sup> Per Ashhurst, J., in Lloyd v. Tompkins, 1 T. R. 673.

<sup>f</sup> *Id.* See also Jerritt v. Weare, 3 Price, 575.

<sup>g</sup> Hodgson v. The East India Company, 8 T. R. 278. And see Foster v. Pierson, 4 T. R. 617.

(1) (*Webb v. Alexander*, 7 Wend. 281.)



power of appointment. joyment, without any let, suit, &c., of the appointor, or any person or persons *claiming or to claim by, from or under him*, although the estate proceeded from the wife of the appointor, and he and she joined in exercising the power.<sup>a</sup> So

Eldest son of lessor.

\*624

the eldest son of the lessor is within such a covenant; as where the tenant for life under a marriage settlement, with power to grant leases for three lives, granted a lease of part of the estate to *A.*, during the life of the latter and his two sons, and the survivors and survivor, covenanting for quiet enjoyment for and during the said term, without interruption of lessor, his heirs and assigns, \*or any other person claiming any estate, &c., under him, or any of his ancestors. The lessor having died, his eldest son, who was tenant in tail under the settlement, evicted the eldest son of the lessee, the third life being still in being. In covenant upon the lease; held, 1st, that the eviction of the tenant was a breach of the covenant for quiet enjoyment; and, 2dly, that the term demised by the lease, meant a term to endure during three lives, and not merely during the life of the lessor.<sup>b</sup>

What constitutes a breach of covenant for quiet enjoyment

A breach of covenant for quiet enjoyment may occur either by a molestation arising from a suit at law or in equity relating to the title or possession, or by any act whereby the tenant is disturbed in the possession of the premises. But where, in a covenant for quiet enjoyment, the breach assigned was, that the defendant had exhibited a bill in Chancery against him for ploughing meadow, &c., it was held on demurrer to be no breach of covenant, for the covenant was for quiet enjoyment, and this was a suit for waste.<sup>c</sup> A covenant for quiet enjoyment does not extend to oblige a lessor to rebuild in case of accident by fire.<sup>d</sup> But any act of molestation, whether committed by the covenantor himself, or by his servant at his command, will be a breach of covenant.<sup>e</sup> As if a man covenant that he will not interrupt the covenantee in the enjoyment of a close, the erection of a gate which intercepts it is a breach of the covenant, though the covenantor had a right to erect it.<sup>f</sup> So the disturbance of a way of necessity is a breach of covenant;<sup>g</sup> or of a way by grant from the covenantor.<sup>h</sup>

In a covenant, the word "acts" means something done by the person against whose acts the covenant is made; and the word "means" has a similar meaning, something proceeding from the person covenanting. Accordingly, where the governors of the Foundling Hospital granted a lease for years of a certain dwelling to *L.*, and covenanted that the demised premises, or any part thereof, should not be converted into a shop

\*625 \*or other place for carrying on any trade or public show of

<sup>a</sup> *Hurd v. Fletcher*, Doug. 43.

<sup>b</sup> *Evans v. Vaughan*, 4 B. & C. 261.

<sup>c</sup> *Morgan v. Hunt*, 2 Ventr. 213.

<sup>d</sup> *Seaman v. Browning*, 1 Leon. 157.

<sup>e</sup> *Morris v. Edington*, 3 Taunt. 24.

(10 Eng. C. L. 327.) 6 D. & R. 349.

<sup>f</sup> *Brown v. Quilter*, Ambl. 621, *ante*, 615.

<sup>g</sup> *Andrews v. Paradise*, 8 Mod. 318.

<sup>h</sup> *Pomfret v. Ricraft*, 1 Saund. 322.

business during the term, without the consent in writing of the lessors. *L.* assigned the premises to *M.*, who, by an underlease, demised the premises to *F.*, with a covenant for quiet enjoyment, "to hold the same, without any lawful let, suit, trouble, molestation, eviction, interruption, claim, or demand whatsoever, by or for her, her heirs, executors, administrators, or assigns, or any person or persons whomsoever, claiming or to claim by, from, under, or in trust for her, them, or any of them, or by or through her or their acts, means, right, title, forfeiture, privity, or procurement." In this lease the covenant against converting the premises into a shop, &c., was omitted. *F.* assigned the lease to *S.*, who underlet it to *W.*, and he converted part of the premises into a shop, without the consent of the original lessors, who brought an ejectment, and evicted him for a forfeiture. *M.* having died, *S.* declared against her executor for a breach of the covenant of quiet enjoyment, averring that by her act, and through her means and procurement, in making the underlease to *F.*, without any covenant similar to that in the original lease to *L.*, he was hindered from quietly enjoying, &c.: held on demurrer, that the action would not lie, for it was not an eviction by means of the lessor within the meaning of the covenant.<sup>a</sup>

In covenant for quiet enjoyment, the declaration stated, that before the demise to the plaintiff, the defendant had made a demise to *A.*, which was then subsisting; that in order to get into possession, the plaintiff brought an ejectment, but was nonsuited on account of that prior demise; and that he had never been in possession; plea, that for the first half year of the plaintiff's lease the plaintiff might have enjoyed, &c., but that for non-payment of the rent for twenty-one days after that half year, the defendant had a right to re-enter, according to a proviso in the lease, and that he did re-enter, &c.; it was held on demurrer, that this was no answer to the plaintiff's demand.<sup>b</sup>

## \*SECTION IX.

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### COVENANTS NOT TO ASSIGN WITHOUT LICENSE.

As every man who lets property is desirous of having the premises kept in repair, or his land cultivated in a proper course of husbandry, it is but reasonable that he should exercise his judgment in the selection of a tenant, and that he should have a right of preventing his estate from falling into

<sup>a</sup> *Spencer v. Marriott*, 2 D. & R. 665. 1 B. & C. 457. (8 Eng. C. L. 129.)

<sup>b</sup> *Ludwell v. Newman*, 6 T. R. 458.

A covenant not to assign is "a fair and usual covenant."

Letting lodgings.

\*627

Letting part of the premises with exclusive possession is a breach.

the hands of a person in whose skill in husbandry, industry, or honesty he can repose no confidence. An attention to these circumstances leads very frequently to the introduction into leases of a covenant not to assign or underlet without license of the lessor, with a clause of re-entry in case of a breach. A covenant not to assign or underlet has been considered a fair and usual covenant,<sup>a</sup> but it has been held, that an agreement for a lease, "with common and usual covenants," did not entitle the lessor to a covenant, "not to assign or underlet without license."<sup>b</sup> Covenants of this description have been construed by courts of law, with great jealousy and strictness. It has therefore been held in many cases, that a covenant in restraint of assignment, did not extend to an under-lease, that being merely the creation of a partial subordinate interest, and not a transfer of the whole estate.<sup>c</sup> Yet a covenant not to let or demise for all or any part of the term has been held to be broken by an assignment.<sup>d</sup> Letting lodgings is not a breach of a covenant not "to let, set, assign, transfer, set over, or otherwise part with the tenement, or any part thereof."<sup>e</sup> So a covenant in a lease of a chop-house not to let, set, assign, transfer, set over, or "otherwise part with the premises thereby demised, on that present indenture of lease," is not broken by proof of a deposit of the lease with the brewers of the lessee, as a security for money advanced and beer supplied to the house, as it could not be deemed to be a parting with the premises within the meaning of the covenant.<sup>f</sup>

But where a lease contained a proviso for re-entry in case the tenant, his executors or administrators, should demise, lease, grant, or let the said demised premises, or any part or parcel thereof, or convey, alien, assign, or set over the indenture or his or her interest therein, or any part thereof to any person whatsoever without special license of the lessor, &c.; and the defendant without such license let one *P.* into the occupation of part of the premises exclusively, and of the other parts jointly with himself, which premises *P.* was to deliver up on being required so to do on receiving three months' notice from the defendant; held, that it was a parting with the exclusive possession of some part of the demised premises; and

<sup>a</sup> *Morgan v. Slaughter*, 1 Esp. 8. *Folkingham v. Croft*, 3 Anst. 700.

<sup>b</sup> *Henderson v. Hay*, 3 Bro. Ch. Ca. 632. *Church v. Brown*, 15 Ves. 258. *Brown v. Ruban*, *id.* 529.

<sup>c</sup> *Crusoe dem. Blencowe v. Bugby*, 2 Bl. 766. 3 Wils. 235. *Kinnersley v. Orpe*, Doug. 67. *Church v. Brown*, 15 Ves. 265. But a covenant not to assign or otherwise part with the premises or any part thereof for the whole or any part of the term, is broken by an under-lease. *Doe d. Holland v. Worsley*, 1 Camp. 20.

<sup>d</sup> *Greenaway v. Adams*, 12 Ves. 395. *Berry v. Taunton*, Cro. Eliz. 331.

<sup>e</sup> *Doe d. Pitt v. Laming*, 4 Camp. 73. *Ellenborough*. An advertisement of a lease will not create a breach of a condition or covenant prohibiting an under-lease if no under-lease be made. *Barclay v. The Duke of Somerset*, 1 V. & B. 68.

<sup>f</sup> *Doe d. Pitt v. Hogg*, 4 D. & R. 226. (16 Eng. C. L. 196; 11 Eng. C. L. 355.) S. C. *nom.* *Doe d. Pitt v. Laming*, R. & M. 36.

conferred on the lessor a right of re-entry.<sup>a</sup> So, where a lessee of a house and garden for a term of years covenanted with the lessor "not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business whatsoever, &c., without the license of the lessor," &c., and afterwards, without the license of the lessor, assigned the lease to a schoolmaster, who carried on his business in the house and premises; held, that the assignment was a breach of this covenant, and the lessor entitled to re-enter under a proviso for re-entry for non-performance of covenants.<sup>b</sup>

Where a lease contained a stipulation, that, for every acre, and so on in proportion for a less quantity, of the land which the lessee should suffer to be occupied by any other person without the consent of the landlord, an additional rent should be paid; the tenant undertook to use, occupy, dress, and manure the land according to the custom of the country. \*Without the consent of the landlord, he suffered other persons to use small portions of the land for the purpose of raising a potato crop. It was proved to be the custom of the country for farmers to pursue that course. Held, that the landlord was entitled to the additional rent, this being an occupation by other persons.<sup>c</sup> \*628

The ordinary clause restraining the tenant, his executors, administrators, or assigns from assigning, has been construed to mean voluntary assignments only, and not to affect assignments by operation of law. Therefore where a lessee who had covenanted "not to let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture," &c., with a proviso that the landlord might in such case re-enter, gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold; this was held to be no forfeiture of the lease.<sup>d</sup> But it being found by a verdict that the tenant gave such warrant of attorney to a creditor for the express purpose of enabling such creditor to take the lease in execution under the judgment; this was held to be in fraud of the covenant, and the landlord, under the clause of re-entry, recovered the premises in ejectment from a purchaser under the sheriff's sale.<sup>e</sup> So where S., a lessee for years, covenanted that he, his executors, administrators, or assigns, would not assign the indenture, or his or their interests therein, or assign the premises to any person whatsoever, without the consent in writing of the lessor; proviso, that in case S. his executors, administrators, or assigns, should part with his or their interest,

Covenants  
against  
alienation  
do not ex-  
tend to as-  
signments  
by opera-  
tion of law

<sup>a</sup> *Roe d. Dingley v. Sales*, 1 M. & S. 297. See *Doe d. Wetherhead v. Curwood*, 1 H. & W. 140, *post*, 634.

<sup>b</sup> *Doe d. Bish v. Keeling*, 1 M. & S. 95.

<sup>c</sup> *Greenslade v. Tapscott*, 1 C. M. & Ros. 55. 4 Tyr. 566.

<sup>d</sup> *Doe d. Mitchinson v. Carter*, 8 T. R. 57.

<sup>e</sup> *S. C. id.* 300.

contrary to his covenant, the lessor might re-enter, and *S.* deposited the lease as a security for money borrowed, and became bankrupt, and the lease was sold by direction of the chancellor to pay that debt; held, that the assignees under the commission might assign the lease to the vendee, without the consent of the lessor. "The reason of which is," said Lord Ellenborough, "that the assignee in law cannot be encumbered with the engagement belonging to the property which he takes, such as in \*this case the carrying on of a bankrupt's trade in a public-house.<sup>a</sup> Besides, in cases of bankruptcy the assent of the lessor is presumed in law to have been given to the assignment of the premises by the commissioners.<sup>b</sup> Where *A.* granted a lease to *B.*, which contained a covenant that *B.*, his executors or administrators, without mentioning "assigns," should not underlet without the consent of the lessor. *B.* became bankrupt, and his assignees assigned the premises to *C.*, *B.* obtained his certificate, and *C.* re-assigned the premises to him, after which he underlet them to another person. Held, that *B.* having been discharged at the time of his bankruptcy from all covenants in the lease by the statute, the underletting by him, which was in the character of assignee, was no forfeiture of the lease.<sup>c</sup> A lease contained a proviso for re-entry of the lessor, and that the lease should be void on the lessee's assigning without the license of the lessor. The lessee in *January* 1825, executed a deed which purported to convey all his real and personal property to trustees, for the benefit of his creditors. In *April* 1825, a commission of bankrupt issued against the lessee and he was duly declared a bankrupt. Held, that the deed of *January* 1825, was an act of bankruptcy and void, and that it did not operate as a valid assignment of the tenant's interest in the lease, and, therefore, that there was no forfeiture.<sup>d</sup>

In consequence of these resolutions it is not now unusual to stipulate in a lease for its determination in case the lessee should become bankrupt, and provisions of that kind have been held to be perfectly legal.<sup>e</sup>

**Covenants against assignments by operation of law** Where one leased for twenty-one years, if the tenant, his executors, &c., should so long continue to inhabit and dwell in the farm house, and actually occupy the land, &c., and not let, set, assign over, or otherwise part with the lease; held, that the tenant having become bankrupt, and his assignees having \*possessed themselves of the premises and sold the lease, and the bankrupt being out of the actual possession and occupa-

<sup>a</sup> *Doe d. Goodbehere v. Bevan*, 3 M. & S. 353.

<sup>b</sup> *Wadham v. Marlowe*, 2 Chitty, 600. (18 Eng. C. L. 431.) *Philpott v. Hoare*, Amb. 480.

<sup>c</sup> *Doe d. Cheere v. Smith*, 1 Marsh. 359. 5 Taunt. 795. (1 Eng. C. L. 270.)

<sup>d</sup> *Doe d. Lloyd v. Powell*, 5 B. & C. 308 (11 Eng. C. L. 241.)

<sup>e</sup> *Roe d. Hunter v. Galliers*, 2 T. R. 153 *Wetherell v. Geering*, 12 Ves. 512. But if standing timber be sold to a trader, with a proviso in case of bankruptcy, that the vendor shall retake it, such proviso is void. *Holroyd v. Gwynne*, 2 Taunt. 176.

tion of the farm the lessor might maintain ejectment without a previous re-entry, the continuance of the term itself being made to depend upon the lessor's actual occupation.<sup>a</sup> So where a lease contained a clause of re-entry in case the term of years thereby granted should be *extended or taken in execution*, and before the end of the term the sheriff entered the premises under a writ of extent against the lessee at the suit of the crown, held an inquisition, and seised the lessee's interest into the king's hands; held, that this proceeding was a *taking in execution* within the latter clause of the condition, and that the term was determined and forfeited to the lessor.<sup>b</sup>

Although executors and administrators are not comprehended within the clause restraining the assignment, so as to occasion a breach by the term vesting in them, yet where they are named in the covenant they are bound thereby, and can only convey the estate in the same manner that the testator or intestate could have conveyed. Thus where a lease contained a proviso that the lessee and administrators should not set, let, or assign over the whole or part of the premises without leave in writing, on pain of forfeiting the lease; it was held, that the administratrix of the lessee could not underlet without incurring a forfeiture.<sup>c</sup>

Personal  
represent-  
atives are  
bound  
when  
named.

In *Doe v. Bevan*,<sup>d</sup> the court distinguished the preceding case from that of assignees of a bankrupt, inasmuch as executors and administrators were volunteers, and at perfect liberty not to act, whereas the assignees under a commission of bankruptcy acted under compulsion of law, besides in this case the underletting by the administratrix was expressly provided against.

If the covenant or proviso does not contain the word *executors*, but is confined to an assignment by the lessee himself, it may be doubted whether the restriction would extend to permit a conveyance by the executor.<sup>e</sup> But a covenant by a lessee for himself and assigns, will not bind his administrator.<sup>f</sup> If a *covenant not to assign* contains an exception in favor of an assignment by will, the executors claiming under the will are not within the exception, so as to be at liberty to sell for payment of the testator's debts, without the leave of the lessor.<sup>g</sup> Taking the benefit of the insolvent act has been considered a *voluntary* assignment, so as to create a forfeiture of a lease, containing a covenant against alienation, on the grounds that the lessee is not in a situation to be com-

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<sup>a</sup> *Doe d. Lockwood v. Clarke*, 8 East, 185.

<sup>b</sup> *Rex v. Topping*, M'Clel. & Y. 544.

<sup>c</sup> *Roe d. Gregson v. Harrison*, 2 T. R. 425.

<sup>d</sup> *Ante*, 629.

<sup>e</sup> *Anon. Dyer*, 65. 2 T. R. 429.

<sup>f</sup> *Sir Wm. Moor's case*, Cro. Eliz. 26. *Thornhill v. King*, *id.* 757.

<sup>g</sup> *Lloyd v. Crispe*, 5 Taunt. 249. (1 Eng. C. L. 95.) In such case, however, Equity would relieve against the forfeiture. *Cox v. Brown*, 1 Rep. in Ch. 170. *Reynolds v. Pitt*, 19 Ves. 142. See Platt. on Cov. 423.



pelled to part with his property;<sup>a</sup> but if the lessee be a single woman, her taking a husband is not a breach of her covenant against alienation.<sup>b</sup>

**Breach.** In addition to the covenant against alienation without license it is usual to reserve to the landlord a power of re-entry, on a breach of the covenants. This provision will enable him to re-enter or bring ejectment, and thereby determine the tenancy. But in the absence of a proviso for re-entry, a mere covenant not to assign will not operate in defeasance of the estate, it will merely enable the lessor to recover damages.<sup>c</sup> The general principle is, that the lessee may assign his interest in the term, but the lessor may restrain the lessee from assigning by proviso or covenant, and if he grants the term subject to a condition that it shall cease, if the lessee assigns, an assignment of the lease will be void; but if he restrain the lessee by covenant only, the lessee by assigning commits a breach of covenant, but the assignment itself is not void.<sup>d</sup>

A covenant not to assign without a clause for re-entry will not defeat the estate.

But where in an agreement enuring as a lease, "it was stipulated and conditioned that the lessee should not underlet;" held, that these words created a condition, upon a breach of which the lessor might maintain ejectment, without an express clause of re-entry.<sup>e</sup>

**\*632** **Effect of a license once granted.** \*Where there is a covenant not to assign without license, it is settled law, that if license be once granted, the covenant is discharged, even though the license be in favor of a particular person; for the lessor could not admit the alienation at one time, and yet continue the estate subject to the condition after; as a proviso or condition could not be divided or apportioned by the acts of the parties.<sup>f</sup> But if a lease contain a proviso not to assign or demise the premises without the consent of the lessor in *writing*, a parol license to underlet part of the premises is not sufficient, either in law or in equity, to discharge the lessee from the restrictions of such proviso, unless it be attended with fraud.<sup>g</sup>

<sup>a</sup> *Shee v. Hale*, 13 Ves. 404. See also *Wilkinson v. Wilkinson*, 3 Swanst. 515.

<sup>b</sup> Com. Dig. tit. Condition (Q).

<sup>c</sup> *Doe d. Wilson v. Phillips*, 2 Bing. 13. (9 Eng. C. L. 296.) 9 Moore, 46. *Doe d. Wilson v. Abel*, 2 M. & S. 541.

<sup>d</sup> Per Holroyd, J., in *Paul v. Nurse*, 8 B. & C. 488. (15 Eng. C. L. 273.)

<sup>e</sup> *Doe d. Henniker v. Watt*, 1 M. & R. 694. (15 Eng. C. L. 225.)

<sup>f</sup> *Dumpor's case*, 4 Co. 119. *Whitchcott v. Fox*, Cro. Jac. 398. *Brummell v. Macpherson*, 14 Ves. 175. *Macher v. The Foundling Hospital*, 1 V. & B. 191. If the vendor of a lease in which there is a covenant not to assign contract to assign his interest, it is incumbent on him and not on the purchaser, to procure the lessor's license for the assignment. *Lloyd v. Crispe*, 5 Taunt. 249. (1 Eng. C. L. 95.)

<sup>g</sup> *Roe d. Gregson v. Harrison*, *ante*, 628. *Little v. Holland*, 3 T. R. 590. *Richardson v. Evans*, 3 Madd. 218. But see *Doe v. Curwood*, 1 H. & W. 140, *post*, 634.

## SECTION X.

## WAIVER OF FORFEITURE FOR A BREACH OF COVENANT.

COURTS of law always lean against forfeitures; therefore, whenever a landlord means to take advantage of a breach of covenant which operates as a forfeiture of the lease, he should take care to do no act which may be deemed an acknowledgement of the tenancy and so operate as a waiver of the forfeiture, as distraining for rent, bringing an action for it, or accepting rent after the forfeiture has accrued.<sup>a</sup> There is a distinction however, in the case of a lease for years, between a covenant whereby the lease is made *void* on a breach thereof, and one which merely gives the lessor a power to re-enter. In the former, the term is absolutely terminated by a breach of the covenant, and cannot be set up again by a subsequent acceptance of rent, or any other act of waiver, whereas in the latter <sup>What will amount to a waiver of forfeiture.</sup> the lease is voidable only; it may be affirmed by a subsequent act of waiver or acknowledgement of tenancy, as by accepting rent accrued afterwards, with a knowledge of a breach of the condition which gave him a right to re-enter, for such acts are evidence of an intention that the lease shall continue.<sup>b</sup> But in order to render acceptance of rent or any other act a waiver of forfeiture the lessor must have notice that a forfeiture was incurred at the time;<sup>c</sup> and the rent received must have accrued after the lessor's right of entry; for a subsequent acceptance of a rent by the non-payment of which the forfeiture was incurred, does not operate as a waiver, though a distress for the same rent would dispense with the forfeiture, as it would amount to an acknowledgement that the lessee had lawful possession.<sup>d</sup> Where the son of the lessor demanded rent of the lessee three months after a forfeiture was incurred, it was held that the son having no authority to waive the forfeiture, the demand of rent by him was not such notice to the lessor as would make the demand amount to a waiver.<sup>e</sup>

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But a lessor who has a right of re-entry reserved on breach of a covenant not to underlet, does not, by waiving his re-entry on one underletting, lose his right to re-enter on a subsequent underletting. Nor by waiving his right to re-enter on a breach of covenant to repair, does he waive his re-entry on a subse-

<sup>a</sup> B. N. P. 96. *Doe d. Tarrant v. Hellier*, 3 T. R. 170. Co. Litt. 215, a.

<sup>b</sup> *Id.* *Goodright d. Walter v. Davids*, Cowp. 803. See *Doe d. Bryan v. Banks*, 4 B. & A. 401. (6 Eng. C. L. 462.) *Kennersley v. Orpe*, Doug. 57. *Arnsby v. Woodward*, 6 B. & C. 519. (13 Eng. C. L. 241.) *Doe d. Ambler v. Woodbridge*, 9 B. & C. 376. (17 Eng. C. L. 399.)

<sup>c</sup> *Doe d. Gregson v. Harrison*, 2 T. R. 431. *Pennant's case*, 3 Co. 64. *Whitchcott v. Fox*, Cro. Jac. 398.

<sup>d</sup> *Greene's case*, 1 Leon. 262. *Anon.* 3 Salk. 3. Co. Litt. 311, b.

<sup>e</sup> *Doe d. Nash v. Birch*, 1 Mees. & W. 402. 2 Gale, 26.

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quent want of repairs.\* So where during the existence of a lease containing a proviso for re-entry in case of assignment or underletting without license in writing, the lessor, who had purchased the remainder of the interest in it, engaged to grant a new lease to the defendant, to take effect on the expiration of the old lease; held, that the lessor could not maintain ejectment against the defendant on the fact of his possession, though no license in writing had been granted, as there was a waiver of \*the forfeiture if any had taken place, or else there was no forfeiture at all, for the defendant came in with the lessor's consent.<sup>b</sup> Though a license by parol would be no answer to an action of covenant for a breach of contract, yet in ejectment for a forfeiture on a clause of re-entry, a parol license would be sufficient.<sup>c</sup>

Where on an action of ejectment for the breach of a condition, that the lessee should not underlet, in an agreement amounting to a lease; it appeared in evidence that the lessor of the plaintiff asked the defendant what he would take for his land; and on the defendant naming a price, said, "then let it, and I shall know what it will produce next year;" held, that this was a waiver of the forfeiture, on a breach of such condition.<sup>d</sup>

## SECTION XI.

### VOID AND ILLEGAL COVENANTS.

THE invalidity of covenants is in general governed by the same rules as that of simple contracts which have been already noticed.<sup>e</sup> Covenants founded in fraud, or in violation of the

\* *Doe d. Boscawen v. Bliss*, 4 Taunt. 735. *Doe d. Flower v. Peck*, 1 B. & Ad. 428. (20 Eng. C. L. 417.) *Doe d. Ambler v. Woodbridge*, 9 B. & C. 376. (17 Eng. C. L. 399.)

<sup>b</sup> *Doe dem. Weatherhead v. Curwood*, 1 Har. & Woll. 140.

<sup>c</sup> *Id.*

<sup>d</sup> *Doe d. Henniker v. Watt*, 1 M. & R. 694. 8 B. & C. 308. (15 Eng. C. L. 225.)

<sup>e</sup> *Ante*, 8, 21, et seq. It is, however, observable, that a consideration is necessary to give validity to a *simple contract*, see *ante*, 27. Whereas a *covenant* is obligatory without evidence of a consideration, for the law presumes a consideration for the solemnity which attends the execution of a deed; 2 Bl. Comm. 446. *Fallowes v. Taylor*, 7 T. R. 475. *Binnington v. Wallis*, 4 B. & A. 652. (6 Eng. C. L. 554.) The failure of a consideration is nothing in the case of a contract under seal. Per Parke, B., in *Wallis v. Day*, 2 M. & W. 277, *post*, 641. It is also worthy of notice, that where the parties have no legal capacity to contract, as in the case of idiots, lunatics, married women, infants, &c., their covenant is void *ab initio*, and no subsequent act of confirmation can give it validity; *Farneham v. Atkins*, 1 Sid. 446. Co. Litt. 172. *Ludford v. Barber*, 1 T. R. 867. Though it is otherwise in respect of simple contracts; see *ante*, 138, et seq. There is a known distinction between contracts illegal by statute, and illegal by common law; in the former case, though part of the

precepts \*of morality;<sup>a</sup> or against public policy;<sup>b</sup> or in contravention of the law, are void and cannot be enforced; and so are covenants entered into by parties who are under a legal incapacity to contract.<sup>c</sup> So a covenant to do a thing which is in its nature impossible is void; as if a man undertakes to go to Rome in three hours;<sup>d</sup> or to make a feoffment to his wife.<sup>e</sup> But if the performance of the act stipulated for be *possible* at the time, the covenantor will be liable, however absurd or improbable the event may be; \*as if one covenants that it shall rain to-morrow, or that the Pope shall be at Westminster on such a day.<sup>f</sup>

Impossible covenants are void.

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*A.* held an office in the gift of *B.*, and agreed with *C.* to resign and procure *C.* to be appointed in his stead; in consideration of which, *C.* agreed to give *A.* half the profits, and executed a deed to that effect. *A.* resigned, and *B.*, at his request, but in ignorance of the agreement, appointed *C.* to the office. *A.* brought covenant against *C.* for half the profits; held, that

Fraud will avoid a covenant.

contract be good, yet if part be bad the whole is void; but in the latter a covenant, if independent, may be enforced as to the part that is good, though it be in part bad. *Pigot's case*, 11 Co. 27. *Norton v. Simmes*, Hob. 14. *Fetherston v. Hutchinson*, Cro. Eliz. 729. *Greenwood v. The Bishop of London*, 5 Taunt. 737. (1 Eng. C. L. 250.) *Newman v. Newman*, 4 M. & S. 66. If a party enter into several covenants, one of which cannot be enforced against him, he is not thereby released from performing the other. Per Lord Abinger, C. B., in *Wallis v. Day*, *post*, 641.

<sup>a</sup> A mutual covenant between a man and woman for future cohabitation or the continuance of an illicit intercourse, cannot be enforced either by law or equity; *Franco v. Bolton*, 3 Ves. 371; see other cases in *Platt on Cov.* 569. But past cohabitation *has* been held a sufficient consideration for a bond by the seducer; *Marchioness of Anandale v. Harris*, 2 P. Wms. 433. *Turner v. Vaughan*, 2 Wils. 339. See *ante*, 36.

<sup>b</sup> Covenants in restraint of marriage are against public policy, and cannot be enforced; therefore, where the plaintiff brought an action of covenant on a promise under the defendant's hand and seal to the following effect: "I do hereby promise Mrs. Catherine Lowe, that I will not marry with any person beside herself; if I do, I agree to pay the said Catherine Lowe 1,000*l.* within three months next after I shall marry any body else;" the court held, that the contract was void, and that the action could not be sustained; for the defendant did not promise to marry the plaintiff, he merely covenanted not to marry any one else; it was therefore in restraint of marriage, and consequently illegal. *Lowe v. Peers*, 4 Burr. 2325. *Hartley v. Rice*, 10 East, 23, *ante*, 26. *Cock v. Richards*, 10 Ves. 429. But see *Box v. Day*, 1 Wils. 59.

<sup>c</sup> Idiots, lunatics, infants, and married women, are incapable of binding themselves by covenant, though an infant may bind himself by simple contract for necessities; yet a covenant even for necessities is not binding on him; nor will a promise to perform a covenant after he has arrived at age give it validity; Co. Lit. 172. *Farnham v. Atkins*, 1 Sid. 446. Per Bayley, J., in *Baylis v. Dineley*, 3 M. & S. 482. And though he may voluntarily bind himself an apprentice, yet he will not be bound by a covenant for his apprenticeship; *Gilbert v. Fletcher*, Cro. Car. 179. *Whitly v. Loftus*, 8 Mod. 190. Except by the custom of London, whereby he is made liable to an action on his covenant; *Horn v. Chandler*, 1 Mod. 271. *Walker v. Nicholson*, Cro. Eliz. 652.

Weakness of mind, or intoxication, is not of itself a sufficient ground for avoiding a covenant; *Osmond v. Fitzroy*, 3 P. Wms. 129. *Cragg v. Holme*, 18 Ves. 14. Unless some stratagem or fraud be had recourse to by the person in whose favor it is made. *Pitt v. Smith*, 3 Camp. 33. *Fenton v. Holloway*, 1 Stark. 126. (2 Eng. C. L. 324.) *Cook v. Clayworth*, 18 Ves. 16. *Willis v. Jernegan*, 2 Atk. 251.

<sup>d</sup> Co. Litt. 206, *b.* *Shep. Touch.* 164.

<sup>e</sup> *Id.*

<sup>f</sup> *Roll. Ab.* "Condition," (D.)

the agreement was a fraud upon *B.*, and consequently illegal and void.<sup>a</sup>

Covenants void with reference to the instruments in which they are contained.

Covenants may also be void when considered with reference to the instrument in which they are contained. Whenever a deed is void, all the covenants dependent on the interest professed to be conveyed by that deed are also void.<sup>b</sup> If a covenant is founded on the conveyance of an estate, which proves to be void, so that no estate passes, the covenant is also void; as where the conveyance was "a grant of so much of a term as should be unexpired at the death of *A.*, and there was a covenant for quiet enjoyment, the conveyance being void on account of the uncertainty of the time when the term should commence and end, the covenant which depended on the estate was held to be void.<sup>c</sup> So if a tenant in tail male demise for a term of years, and his lessee assign over to another, but before such assignment tenant in tail male dies without issue male, no action of covenant upon the lease can be maintained against the representatives of the grantor by such assignee, the lease being void at the time of the assignment, and no interest passing under it.<sup>d</sup> So where an apprentice deed was void, being for five years only, in violation of the statute 5 Eliz. c. 4, the court held that the father's covenant to find his child in clothes &c., during the apprenticeship, was completely dependent on the principal agreement, and fell to the ground when that was avoided.<sup>e</sup> So a covenant for payment of rent cannot be enforced, where no estate passes under the lease; as if an attorney grants a lease for another in his own name instead of the name of the principal.<sup>f</sup> So if the committee of a lunatic having no authority for that purpose, makes leases in his own name.<sup>g</sup> And the same result ensues whether the lease be void at common law, or annulled by statute.<sup>h</sup>

Covenant binding though nothing passes by the deed.

But where a covenant is separate and distinct, and independent of any interest contained in the deed, it may be enforced though the deed be void; as where the defendant bargained and sold certain lands to the plaintiff and his heirs, with a proviso for re-entry on payment of a certain sum on a day specified, and then covenanted for payment of money. The deed was not duly enrolled, and it was contended that as nothing passed by the deed the covenant was void; but the court held that, as the covenant was separate and not dependent on the

<sup>a</sup> *Waldo v. Martin*, 4 B. & C. 319. (10 Eng. C. L. 341.) 6 D. & R. 364. See *Morse v. Royal*, 12 Ves. 371.

<sup>b</sup> *Soprani v. Skurro*, Yelv. 18. Platt on Cov. 573.

<sup>c</sup> *Capenhurst v. Capenhurst*, Sir T. Raym. 27. *Hayne v. Maltby*, 3 T. R. 438. Co. Litt. 456.

<sup>d</sup> *Andrew v. Pearce*, 1 N. R. 158.

<sup>e</sup> *Guppy v. Jennings*, 1 Anstr. 256.

<sup>f</sup> *Frontin v. Small*, 2 Lord Raym. 1418. 2 Str. 705. *May v. Trye*, Freem. 447.

<sup>g</sup> *Knipe v. Palmer*, 2 Wils. 130.

<sup>h</sup> *Jevons v. Harridge*, 1 Sid. 308. 1 Saund. 6. See also *Aylett v. Williams*, 3 Lev. 193. *Earl of Portmore v. Bunn*, 1 B. & C. 694. (8 Eng. C. L. 188.) *Johnson v. Wilson*, Willes, 248. Platt on Cov. 575.

estate, it was not necessary to show that any estate passed; and that the defendant was liable.<sup>a</sup> So where an annuity granted by deed, "by a rector out of his benefice," was void by the 13 Eliz. c. 20; it was held that the rector was personally liable on his covenant contained in the deed for the payment of the money.<sup>b</sup> So a distinct covenant in a lease, whereby the tenant bound himself to pay the property tax, and all other taxes imposed on the premises, or on the landlord in respect thereof, though void and illegal by the stat. 46 Geo. III, c. 65, s. 115, was held not to avoid a separate covenant in the lease for payment of rent clear of all parliamentary taxes, &c., generally; for such general words were to be understood of such taxes as the tenant might lawfully engage to defray.<sup>c</sup> Though a bill of sale for transferring the property in a ship by way of mortgage, may be void as such, for want of reciting the certificate of registry therein, as \*required by stat. 26 Geo. III, c. 60, s. 17, yet the mortgagor may be sued upon his personal covenant contained in the same instrument for the repayment of the money lent.<sup>d</sup> So where the defendant and an infant covenanted that they, or one of them, would pay a certain annuity; held, that although the annuity act avoided the contract made by the infant, the covenant might be enforced against the defendant, for there was no reason for saying that when the grant of one was void by matter of law, that a separate grant by another party should be also void.<sup>e</sup>

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SECTION XII.

COVENANTS IN RESTRAINT OF TRADE.

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1.—*Contracts in general restraint of trade.*] ALL agreements which have for their object a general restraint of trade, whether they be by covenant, bond, or simple contract, and whether with or without consideration, are void; but contracts

Contracts in general restraint of trade are void.

<sup>a</sup> Northcott v. Underhill, 1 Lord Raym. 388. 1 Salk. 199.  
<sup>b</sup> Mouys v. Leake, 8 T. R. 411. See Fuller v. Abbott, 4 Taunt. 105. Hoywe v. Synge, 15 East, 440. Biddell v. Leeder, 1 B. & C. 327. (8 Eng. C. L. 88.) Johnston v. Wilson, Willes, 248. 7 Mod. 345. Wynne v. Robinson, 4 Bligh, N. S. 28. Gibbons v. Hooper, 2 B. & Ad. 739. (22 Eng. C. L. 176.)  
<sup>c</sup> Gaskell v. King. 11 East, 165. <sup>d</sup> Kerrison (Knt.) v. Cole, 8 East, 231.  
<sup>e</sup> Gillaw v. Sir John Scott Lillie, 1 Hodges, 160. 1 Bing. N. C. 695. (27 Eng. C. L. 548.)



in partial restraint of trade, such as not to carry on business within a limited distance, or to deal with particular persons, are legal, if made on an adequate consideration, and the restraint be not unreasonable.<sup>a</sup> “The rule of law is, that a contract in general restraint of trade is void, as being against the policy of the law; but if the contract be made upon a sufficient consideration, and the public gain some advantage, it will be good. Suppose a man engaged in trade is desirous, when old age approaches, of selling the good will of his business, he may bind himself to enter into the service of another, and to trade no more on his own account; so long as he is able he is bound to render his services, \*and it cannot be said to be a contract in absolute restraint of trade when there is a contract to serve another for life in the same trade.”<sup>b</sup> The test whether a contract in restraint of trade is reasonable or not, is by considering whether the restraint is such only as to afford a fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than is necessary for the protection of the party, can be of no benefit to either; it can only be oppressive, and if oppressive, in the eye of the law it is unreasonable. No certain precise boundary can be laid down within which restraint is reasonable, and beyond which it is excessive.<sup>c</sup>

\* If a contract restraining a party from carrying on a trade, be wider than the protection of the other party requires, it is void.

2.—*Contracts in partial restraint of trade.*] Where the plaintiff, a chemist and druggist, carrying on business in Taunton, took the defendant as an assistant at a yearly salary, who in consideration thereof entered into a contract not at any time thereafter to carry on the said business in Taunton, or within three miles thereof, under a penalty of 500*l.*, as liquidated damages; after a verdict for the plaintiff in an action for a breach of this contract, judgment was arrested by the court of King’s Bench, on the ground that the restraint imposed on the defendant by the agreement was unreasonable, inasmuch as it operated more largely than the benefit or the protection of the plaintiff could possibly require, it being indefinite in point of time, and neither limited to the plaintiff’s continuing to carry on the business at Taunton, nor even to his life; therefore that the contract was void. But this decision was reversed on a writ of error in the Exchequer chamber. “We agree,” said Tindal, C. J., in delivering the judgment of the court, “in the general principle adopted by the court of King’s Bench; but the difficulty is in the application of that principle to this case;

<sup>a</sup> Mitchell v. Reynolds, 1 P. Wms. 181. Cheesman v. Nainby, 2 Stra. 729. 2 Lord Raym. 1456. Horner v. Ashford, 3 Bing. 322. (11 Eng. C. L. 121.) Wickens v. Evans, 3 Y. & J. 318.

<sup>b</sup> Per Lord Abinger, C. B., in Wallis v. Day, 2 Mees. & W. 281, *post*, 641.

<sup>c</sup> Per Tindal, C. J., in Horner v. Graves, 7 Bing. 743, (20 Eng. C. L. 312,) *post*, 642. A covenant in restraint of trade is not a usual covenant. Van v. Corpe, 3 M. & Keen, 269, *ante*, 617.

where the question turns upon the reasonableness or unreasonableness of the restriction from carrying on business within a certain space, the answer may depend upon various circumstances, such as the nature of the trade, the populousness \*of \*640 the neighborhood, &c. But with respect to *the duration* of A contract restrain- ing a party from carrying on a trade for an indefinite period is not, on that account, void the restriction, the case is different. The good-will of a trade may be sold, or bequeathed, or become the property of the trader's personal representatives. If, therefore, it be not unreasonable (as undeniably it is not) to prevent a servant from entering into the same trade within the same town, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be co-extensive with the servant's life, as the only effectual mode of securing to the master the enjoyment of the price or value for which the trade would sell, or of securing the enjoyment of the same trade to the purchaser or executor; we cannot therefore hold the agreement in this case to be void, merely on the ground of the restriction being indefinite as to duration, the same being in other respects a reasonable restriction. The *inadequacy* of the consideration was urged in argument, as a ground of arresting the judgment. Undoubtedly, there must be a good and valuable consideration to support any contract not under seal, and consequently to sustain a contract in restraint of trade, which is never favored in law. But the court will not weigh whether the consideration is *adequate* or equal in value to that which the party gives up or loses by the restraint under which he has placed himself; for it would be impossible for the court, looking at the record, to say, whether in any particular case, the party restrained had made an improvident bargain or not. It is enough that there actually is *a consideration* for the bargain, and that such consideration is a legal consideration, and of some value. Such appears to be the case in the present instance, where the defendant was retained and employed at an annual salary. We therefore think that the plaintiff has shown upon the record a legal ground of action, and that he is entitled to judgment."<sup>a</sup>

If there be a legal and valuable consideration for a contract in restraint of trade, it is sufficient; the court will not weigh its adequacy.

An agreement by an attorney, first, to relinquish his business and recommend his clients to two other attorneys for a valuable consideration; secondly, not to practise in such business within certain limits; and, thirdly, to permit the purchasers \*to \*641 make use of his name in their firm for a certain time, without any interference on his part, was held valid.<sup>b</sup> So, a contract not to set up as surgeon or man-midwife in a certain town, or within twenty miles thereof, has been held to be legal.<sup>c</sup> So, where a surgeon took an assistant, who entered into a bond not to practise on his own account for fourteen years within

<sup>a</sup> Hitchcock v. Coker, MS. Ex. Chamb., Feb. 1837. 6 Ad. & Ell. 1 Nev. & Perr.

<sup>b</sup> Bunn v. Guy, 4 East, 190. But see Capes v. Hutton, 2 Russ. 357.

<sup>c</sup> Hayward v. Young, 2 Chitty, 407. (18 Eng. C. L. 380.)

ten miles of the place where the surgeon lived; the bond was held to be good.<sup>a</sup>

Where the plaintiff by deed sold to the defendants his trade and business as a carrier between London and Wisbeach, and covenanted that he would not thenceforth during his life exercise the trade of carrier, but that he would serve the defendants as assistant in the trade of carriers; in consideration of which the defendants covenanted to pay him a certain weekly sum during his life; held, in an action against the defendants on the covenant, that the plaintiff's covenant to serve during his life was good in law, and that the covenant in restraint of trade was not void, inasmuch as he was not absolutely restrained from carrying on the trade, but only in carrying it on in any other way than assistant to the defendants.<sup>b</sup> In partnership agreements nothing is more common than to stipulate that neither party shall carry on that particular commercial concern in which they are jointly engaged, for his own private benefit.<sup>c</sup> A coach-maker having sold his share of the business to his partner, with an undertaking not to be concerned in any coach running from *R.* to London, or prejudicial to the business \*642 \*which he had sold; an injunction was granted restraining him from running a coach from *P.* through *R.* to London.<sup>d</sup> A covenant with the proprietors of a theatre not to write dramatic pieces for other theatres, was held good.<sup>e</sup> So a covenant by a dyer, on the sale of the good-will of his business, and of a secret in dyeing, restraining himself generally from using that secret, has been upheld.<sup>f</sup>

There must be an adequate consideration to support a contract in restraint of trade.

But an agreement even in partial restraint of trade can only be supported by an adequate consideration. Therefore, an agreement by which a brass-founder was to work exclusively for certain factors for his and their lives, they not undertaking to find him full employment, but on the contrary, reserving liberty to employ others to execute their orders in his trade, if they should think fit, and to put an end to the agreement at three months' notice, was held not to be sustainable, for he was entirely at their mercy, and there was no adequate consideration for his being bound to work exclusively for them; and a promissory note given to them to secure damages for a breach

<sup>a</sup> *Davis v. Mason*, 5 T. R. 118. Where there was an engagement not to trade within a given distance in a town, it has been held that the distance should be measured by the shortest way of access by the footpath. *Woods v. Dennett*, 2 Stark. 89. (3 Eng. C. L. 259.) So, where the assignor of a lease of a public house in London covenanted that he would not keep a public house within the distance of half a mile from the premises assigned; it was held by Lord Tenterden, C. J., and Littledale, J., that the half mile should be estimated by the nearest mode of access at the time of the covenant. Parke, B., thought that it should be as the crow flies. *Leigh v. Hind*, 9 B. & C. 774. (17 Eng. C. L. 497.) 4 M. & R. 579.

<sup>b</sup> *Wallis v. Day*, 2 M. & W. 273. 3 Mur. & Hur. 22, *ante*, 637.

<sup>c</sup> Per Lord Abinger, *id.* See *Morris v. Coleman*, 18 Ves. 437, *infra*.

<sup>d</sup> *Williams v. Williams*, 2 Swans. 253.

<sup>e</sup> *Morris v. Coleman*, 18 Ves. 437.

<sup>f</sup> *Bryson v. Whitehead*, 1 Sim. & Stu. 74. See also *Green v. Folgam*, *id.* 398.

of this void agreement, was also held to be void.<sup>a</sup> So an agreement that the defendant, a dentist, would abstain from practising within one hundred miles of the city of York, in consideration of receiving instructions and a salary of 120*l.* a year from the plaintiff, determinable at three months' notice, was held to be unreasonable and void; for a circle of one hundred miles from the city inclosed a much larger space than could be necessary for the protection of the plaintiff; and there was no reason why the defendant should not gain his livelihood, and the public receive the benefit of his skill and industry through so wide a space.<sup>b</sup>

But where by indenture between *A. B.*, and *C.*, dissolving their partnership as rope-makers, *A.* and *B.* covenanted to allow *C.*, during his life, two shillings on every cwt. of cordage which they should make on the recommendation of *C.*, for any of \*his friends and connections, and whose debts should turn out to be good; and that *A.* and *B.* should stand the risk of such debts incurred, but should not be compelled to furnish goods to any of *C.*'s connections whom they should be disinclined to trust; and *C.* covenanted not to carry on the business of a rope-maker during his life (except on government contracts;) and that all debts contracted or to be contracted in his or their names, pursuant to the indenture, should be the exclusive property of *A.* and *B.*; and that *C.* should, during his life, exclusively employ *A.* and *B.*, and no other person, to make all the cordage ordered of him by or for his friends and connections, on the terms aforesaid, and should not employ any other person to make any cordage on any pretence whatsoever; the court held, that the covenant by *C.* to employ *A.* and *B.* exclusively to make cordage for his friends, and not to employ any other, &c., (*A.* and *B.* not being obliged to work for any other than such as they chose to trust,) was not illegal and void, as being in restraint of trade without adequate consideration; for the whole indenture must be construed together, according to the apparent reasonable intent of the parties; and the general object being only to appropriate to *A.* and *B.* so much of *C.*'s private trade as they chose to give his friends credit for, so much only was covenanted to be transferred, and *C.* was still at liberty to work for any of his friends who were refused to be trusted by *A.* and *B.*; by which construction the restraint on *C.* was only co-extensive, as in reason it could only be intended to be, with the benefit to *A.* and *B.*; and, therefore, the restraint on *C.* could be no prejudice to public trade.<sup>c</sup> So where three persons carrying on the trade of trunk and box makers, and travelling by themselves and their servants, into various parts of England to vend those articles, entered into an agreement that each should have a certain district, that neither of

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<sup>a</sup> *Young v. Timmins*, 1 C. & J. 331. But see *Hitchcock v. Coker*, *ante*, 640.

<sup>b</sup> *Horner v. Graves*, 7 Bing. 735. (20 Eng. C. L. 310.) See *ante*, 639.

<sup>c</sup> *Gale v. Reed*, 8 East, 80.

them should interfere with the district of the other, or suffer any of his goods to be sold on the ground to be travelled by the other parties during their joint lives, and not to aid or assist any person to oppose any of the parties; and in case at any  
 \*644 time \*during their joint lives, any person should set up and oppose any of them, to meet together and enter into such mutual agreement as might be beneficial to their mutual interests, it being their declared intention to aid and assist each other in their business to the utmost of their power; held, that as this agreement contemplated only a partial and not a general restraint of trade, and as it was founded on a sufficient and valid consideration, it was good; therefore, counts setting forth the same and averring by way of breaches that the defendant travelled in the district of the plaintiff, and sold boxes therein, were held good on general demurrer.<sup>a</sup> An agreement between two coachmasters not to oppose each other, and to charge the same prices, is legal.<sup>b</sup>

Where certain persons, who were carriers to various parts of the country, covenanted to abstain from carrying on their trade within certain limits, in consideration of being paid one-third of the carriage of the butter carried along the line of road; held, that the contract was not an unreasonable restraint of trade.<sup>c</sup>

Cove-  
nants to  
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ly, are  
binding if  
the beer  
be good,  
but not  
otherwise.

3.—*To deal with particular persons.*] Covenants are not unfrequently introduced into leases, more particularly into leases by brewers to publicans, binding the lessee to deal with the lessor exclusively; such contracts, though not considered illegal, are discountenanced by the courts, as prejudicial to the public interest. A contract binding a publican to take all his beer from a particular brewer, is valid so long as good and wholesome beer is supplied. Where a lease contained a provision, that if the lessee should not purchase beer of the lessor, his rent should be advanced; the court censured it strongly, and a plea in bar to an avowry for such advanced rent stating the beer delivered by the plaintiff to be bad, nauseous, and unwholesome, was considered to be a good defence on the merits.<sup>d</sup> So where the contract was framed in the alternative, either that the publican should take all his beer of the brewer, or pay an advanced rent, Lord Ellenborough, held, that it could not be enforced unless it was shown that *good* beer was supplied.<sup>e</sup>

<sup>a</sup> Wickens v. Evans, 3 Y. & J. 318.

<sup>b</sup> Hearn v. Griffin, 2 Chitty, 407. (18 Eng. C. L. 380.)

<sup>c</sup> Archer v. Marsh, MS. K. B. T. T. 1837. 2 N. & Perr. See Hitchcock v. Coker, 2 H. & W. 464. 1 N. & Perr. 796, *ante*, 639.

<sup>d</sup> Cooper v. Twibill, 3 Camp. 286, *n.* Ellenborough.

<sup>e</sup> Holcomb v. Hewson, 3 Camp. 391. See Thornton v. Sherratt, 8 Taunt. 529, (4 Eng. C. L. 199,) where it was held that a condition in a deed of composition, that a publican shall continue to deal for twelve years with his creditors in the articles of their respective trades, was valid: but it was qualified by the implied condition, that such articles should be good and of a marketable quality.



\*And where in the conditions of sale of a public-house it was described as a free public-house, and the lease contained a clause of this nature; it was held, that the purchaser was not bound to complete his purchase, and might recover back his deposit, even although the lease was read over by the auctioneer at the time of sale.<sup>a</sup> Lord Kenyon doubted whether a covenant contained in the assignment of a lease requiring the assignee and his assigns to buy beer of the assignor, was obligatory on a subsequent assignee.<sup>b</sup> And where the lessee of a public-house covenanted for himself, his executors, and assigns, to take all his beer of the lessors, (who were brewers,) or their successors *in their said trade*, and the lessors sold their trade, and the public-house, with other premises, to third persons, who removed the plant, &c., to a distance of two miles and there carried on the business of brewers; it was held, that the trade of the lessors was then determined, and that their assignee could not take advantage of the covenant on the assignee of the lessee purchasing beer of another brewer. Bayley, J., was of opinion that the successors of a party in business were they who carried on the same business and in the same place.<sup>c</sup>

The plaintiff demised a public-house to the defendant, the defendant to take all his malt of the plaintiff; the plaintiff upon every reasonable request to deliver good malt, and if he did not, the defendant to be at liberty to buy it of any other; breach, that the defendant used a quantity of malt not bought of the plaintiff, and without requiring the plaintiff to deliver such; plea, that the plaintiff had delivered bad malt to the defendant, who thereupon bought malt of others; held, that the plea was bad, for as one failure by the plaintiff would not operate as a total suspension of the covenant, the defendant should have alleged a request to send him good malt, and that he had purchased the malt of others on the plaintiff's failure to do so.<sup>d</sup>

\*4.—*Covenants respecting particular trades.*] It is not unusual, particularly in leases of houses in towns, to insert a covenant restraining the lessee from carrying on or assigning the premises to persons carrying on obnoxious trades, and sometimes there is a restriction in a lease, that the premises shall only be used for the purpose of one specified trade; as is the case in leases of public-houses. It appears that such restrictions are not only legal, but usual and common in some trades.<sup>e</sup> Thus where an action was brought on an agreement

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Covenants in restraint of particular trades are "usual and common."

<sup>a</sup> Jones v. Edney, 3 Camp. 285. Ellenborough.

<sup>b</sup> Hartley v. Pehall, Peake, 131.

<sup>c</sup> Doe on dem. Calvert v. Reid, 10 B. & C. 849. (21 Eng. C. L. 180.)

<sup>d</sup> Weaver v. Sessions, 6 Taunt. 154. (1 Eng. C. L. 340.)

<sup>e</sup> Woodfall's Landlord & Tenant, 464. But see Van v. Corp, 3 M. & Keen, 296 ante, 637.



to accept an assignment of the lease of a public house, which in the agreement was described as holden at a certain *net annual rent under usual and common covenants*, and the lease contained a covenant by the tenant to pay land-tax, sewers-rate, and all other taxes, and a proviso for re-entry if any business but that of a victualler should be carried on in the house and it was proved that a considerable majority of public-house leases contained such a proviso: held, that the covenant to pay land-tax, &c. was a common covenant in a lease, reserving a net rent; and that the proviso for re-entry must, with reference to a lease of a public-house, also be considered usual and common.<sup>a</sup>

Where a lessee of a house and garden for a term of years covenanted with the lessor "not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business whatsoever, &c. without the license of the lessor," &c.; and afterwards, without the license of the lessor assigned the lease to a schoolmaster, who carried on his business in the house and premises; held, that the assignment was a breach of this covenant, and the lessor entitled to re-enter, under a proviso for re-entry for non-performance of covenants.<sup>b</sup>

\*647 A covenant in a lease that the lessee shall not exercise the trade of a butcher upon the premises, is broken by there selling raw meat by retail, although no beasts were there slaughtered for, said Lord Ellenborough, C. J., "the real object in all these cases is to prevent the lowering of the tenement in the scale of houses by the exercise, whether wholly or partially, of those trades which in the judgment of the lessor are likely to prevent tenants from afterwards taking the premises, and which by so doing may depreciate the due value at a distant period."<sup>c</sup> But a covenant not to suffer certain trades to be carried on on the premises, among others those of a common brewer, or retailers of beer, was held not to be violated by carrying on the business of a retail brewer.<sup>d</sup>

In construing a covenant not to carry on any offensive trade or business on premises demised much will depend on the situation of the premises; and in construing such a covenant it is particularly worthy of consideration, whether such trade as that complained of was carried on there at the time of the demise; and it seems that a trade carried on there at the time of the demise, would not be within the covenant.<sup>e</sup>

Where in a lease for years of a messuage and premises in a public street, the lessee covenanted that he, his executors, &c.,

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<sup>a</sup> Bennet v. Womack, 7 B. & C. 627. (14 Eng. C. L. 104.) 1 M. & R. 644.  
<sup>b</sup> Doe d. Bish v. Keeling, 1 M. & S. 95.  
<sup>c</sup> Doe d. Gaskell v. Spry, 1 B. & A. 617.  
<sup>d</sup> Simons v. Farren, 1 Bing. N. C. 126. (27 Eng. C. L. 332.) 4 M. & Scott, 672.  
<sup>e</sup> Gutteridge v. Munyard, 7 C. & P. 129. (32 Eng. C. L.) 1 M. & Rob. 334, Tindal.

should not permit or suffer any person or persons to inhabit the same, who should carry on therein certain enumerated trades or businesses, "or any other trade or business that might be, or grow or lead to be offensive, or any annoyance or disturbance, to any of the other tenants of the lessor," &c., the lessee granted an under lease of the premises (subject to the like covenant) to *A.*, who opened them as a public-house, in the business of a licensed victualler, which was not one of the businesses enumerated in the covenant; held, that such an act did not amount to a breach of covenant.<sup>a</sup> So where in a lease of a house, there was a covenant with a clause of forfeiture, not to use or exercise the trades or business of a butcher, baker, slaughterman, melter of tallow, tallow chandler, &c., or any offensive trade without a license; it was held, that using the house as a private lunatic asylum did not operate as a forfeiture, for the words trade and business, as used in the agreement, were \*applicable only to business conducted by buying and selling; it must be *ejusdem generis* with the trades enumerated.<sup>b</sup> \*648

Where there is a covenant against carrying on a particular trade, without a written license, the mere fact of the lessor's suffering the tenant to carry on one trade on the premises, will not afterwards authorise his carrying on another, without a written license.<sup>c</sup> On a covenant that (in consideration of a weekly payment to *A.* and his executors for a term certain) *A.* shall not exercise a particular trade, the executors of *A.* are not bound to abstain from exercising it.<sup>d</sup>

If a lessee exercise a trade on the demised premises by which his lease is forfeited, the landlord does not, by merely lying by and witnessing the act for six years, waive the forfeiture. Some positive act of waiver, as receipt of rent, is necessary. But if he permit the tenant to expend money in the improvements, *semble*, that it is evidence to be left to a jury, of his consent to the alteration of the premises.<sup>e</sup>

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<sup>a</sup> Jones v. Thorne, 3 D. & R. 152. 1 B. & C. 715. (8 Eng. C. L. 197.)

<sup>b</sup> Doe on dem. Wetherell v. Bird, 2 Ad. & Ell. 161. (29 Eng. C. L. 57.) 4 N. & M. 285.

<sup>c</sup> Macher v. Foundling Hospital, 1 Ves. & B. 182.

<sup>d</sup> Cook v. Calcraft, 2 Black. 856. 3 Wils. 380.

<sup>e</sup> Doe d. Shephard v. Allen, 3 Taunt. 78.

## SECTION XIII.

## WHAT WILL DISCHARGE A COVENANT.

	PAGE		PAGE
1. When a covenant will not be discharged by any collateral matter.		3. When discharged by operation of the law.	650
2. When discharged by the act of God.	650	4. When discharged by the act or omission of the covenantee.	652

Inevitable necessity is no excuse for non-performance of a covenant.

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1.—*When a covenant shall not be discharged by any collateral matter.*] It is an established rule, that when a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he can, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. Therefore, if a lessee covenant to repair a house, though it be burnt by lightning or thrown down by a tempest, yet he is bound to repair it.<sup>a</sup> But where the law creates a duty \*and the party is disabled to perform it without any default in him, *and he has no remedy over*, the law will excuse him, as in waste if a house be destroyed by tempest.<sup>b</sup>

On the principle above stated, where the defendant covenanted to build a bridge over a river and keep it in repair, the court held that it was no answer to an action on his covenant for not keeping the bridge in repair, that the bridge was by the act of God, by a great and extraordinary flood of water such as the bridge could not resist, without the default of the defendant washed and broken down.<sup>c</sup> If a man covenants to deliver goods at London, the overturning of the boat by a tempest will not excuse him.<sup>d</sup> So it has been held that an act of piracy, not specially provided against, was no excuse for the non-performance of a covenant by the master of a vessel to bring freight to a certain port.<sup>e</sup> So where the charterer of a ship covenanted to send a cargo alongside at a foreign port, it was held to be no excuse for the non-performance of his contract, that in consequence of the prevalence of an infectious disorder at the port, all public intercourse was prevented by the law at the port. “If, indeed,” said Lord Ellenborough, “the performance of this covenant had been rendered unlawful by

<sup>a</sup> *Pardine v. Jane*, Alleyn. 27, recognised by Lord Ellenborough in *Atkinson v. Ritchie*, 10 East, 533, see *ante*, 607, who said that it was recognised in many cases as a sound rule. 2 Saund. 422.

<sup>b</sup> *Id.*

<sup>c</sup> *Brecknock Navigation Company v. Pritchard*, 6 T. R. 750. *Bullock v. Dommitt*, *id.* 650. *Chesterfield (Earl of) v. The Duke of Bolton*, Com. Rep. 627.

<sup>d</sup> *Tompson v. Miles*, Rol. Ab. “Condition,” G. 219. *Cooke v. Jennings*, 7 T. R. 381.

<sup>e</sup> *Bright v. Cowper*, 1 Brownl. 21, recognised by Grose, J., in *Cooke v. Jennings*, 7 T. R. 385, and by Lord Ellenborough, in *Smith v. Wilson*, 8 East, 445.

the government of this country, the contract would have been dissolved on both sides, and the defendant would have been excused for the non-performance of it. But if in consequence of events which happen at a foreign port the freighter is prevented from furnishing a load there which he has contracted to furnish, the contract is neither dissolved nor is he excused for not performing it, but he must answer in damages."<sup>a</sup>

\*And even if a party covenants for the performance of an act which depends entirely on the will of a third party, over whom he has no control, he must answer for a breach in damages. As if a man covenants that his son shall marry the covenantor's daughter, a refusal by her will not discharge the covenantor from making pecuniary satisfaction;<sup>b</sup> or if *A.* covenants to enfeoff *B.*, *A.* is not released from his covenant though *B.* will not accept livery of seisin, unless the act be frustrated by the act of the covenantee.<sup>c</sup> \*650

2.—*Covenants discharged by the act of God.*] But it is said that if the performance of the covenant be rendered impossible by the act of God, the covenantor shall be discharged, *quia impotentia excusat legem*. As if a lessee covenants to leave a wood in as good a plight as the wood was at the time of the lease, and afterwards the trees are blown down by the tempest;<sup>d</sup> or if one covenants to serve another for seven years and he dies before the expiration of the seven years, the covenant is discharged, because the act of God defeats the possibility of performance.<sup>e</sup> So if a man covenant to deliver a horse to another on request, and the horse die without his default before request, the death of the horse being the act of God, he will be discharged from the performance of his covenant.<sup>f</sup> It is laid down in *Rol. Ab.*, "If a man covenant to build a house before such a day, and afterwards the plague is there before the day, and continues there till after the day, this will excuse him for the breach of covenant for not doing thereof before the day, for the law will not compel him to venture his life for it, but he may do it after."<sup>g</sup> When the act of God will discharge a covenantor.

<sup>a</sup> *Barker v. Hodgson*, 3 M. & S. 267. *Shubrick v. Salmond*, 3 Burr. 1637. So it has been held to be no defence to an action on a charterparty for not sailing on a voyage towards a port agreed upon, that the port was in a state of blockade, particularly as the blockade was publicly notified to the English government, so that the defendant must be taken to have been aware of the fact at the time of entering into the charterparty. *Medeiros v. Hill*, 8 Bing. 231. (21 Eng. C. L. 284.) 5 C. & P. 182. (24 Eng. C. L. 268.)

<sup>b</sup> *Perk. sec.* 736.

<sup>c</sup> Per Lord Kenyon, C. J., in *Cook v. Jennings*, 7 T. R. 384.

<sup>d</sup> *Perk. Pl.* 738.

<sup>e</sup> *Shep. Touch.* 180. *Nash v. Aston*. *Skin.* 42. *Sir T. Jon.* 195.

<sup>f</sup> *Williams v. Lloyd*, *Sir W. Jones*, 179. *S. C. nom. Williams v. Hill*, *Palm.* 548. See *Platt on Cov.* 584. *Co. Litt.* 206. *Com. Dig.* "Condition," (D. L.) 2 Bl. *Com.* 340.

<sup>g</sup> 1 *Rol. Ab.* 450. *Pl.* 10. But *quære*, will he not be liable in damages for the

When an act of parliament will discharge a covenant.

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S.—*Covenants discharged by operation of law.*] The difference \*established with regard to the question whether a covenant is repealed by act of parliament or not, is this: when a man covenants not to do a thing which it was lawful for him to do, and an act of parliament afterwards compels him to do it, the act repeals the covenant; and so it is where a man covenants to do a thing that is lawful, and a subsequent act hinders him from doing it; but if a man covenants not to do a thing, which was unlawful at the time of the covenant, and afterwards an act makes it lawful, the statute does not repeal the covenant.<sup>a</sup> But if he covenants to do a thing which was then unlawful, and a subsequent statute legalises the act, such statute does not repeal the covenant.<sup>b</sup>

It may be laid down as a general rule, that if a party covenants to do an act which was then lawful, and the performance of the act be afterwards rendered unlawful by statute or by the government of this country, he would be discharged from all liability on account of the non-performance of it.<sup>c</sup>

Covenants discharged by the act of the law.

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Whenever a covenant is dependent on the interest professed to be conveyed by the instrument in which it is contained, the destruction of that interest avoids the covenant. As if a tenant for term of years leases for a less term and assigns his reversion, and the assignee takes a conveyance of the fee, by which his former reversionary interest is merged, the covenants incident to that reversionary interest are thereby extinguished.<sup>d</sup> So if a lessee for years covenants to repair and yield up at the end of the term, an eviction by an elder title annuls the covenant and absolves him from the contract.<sup>e</sup> So if a man covenants to pay rent, and the lease is extended for the king's debt, the covenant is avoided.<sup>f</sup> So where the covenant is to do a solitary act, as to repair a house by such a time, and the covenantee \*once recovers damages for a breach thereof, the covenantor is discharged from further responsibility.<sup>g</sup>

Lessees becoming bankrupts

We have already noticed how lessees becoming bankrupts may be discharged from covenants contained in their leases.<sup>h</sup> It may be here observed, that if there be mutual covenants between the lessor and the lessee, and the covenant is discharged on one side, as by the bankruptcy of the lessee, it is also dis-

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breach? See the observations of Lord Ellenborough, in *Barker v. Hodgson*, 3 M. & S. 270, *ante*, 649.

<sup>a</sup> Per Holt, C. J., in *Brewster v. Kitchin*, 1 Lord Raym. 391. S. P. Salk. 198. Comb. 467, recognised by Lord Alvanley, *Touteng v. Hubbard*, 3 B. & P. 301.

<sup>b</sup> See *Brewster v. Kitchin*, 12 Mod. 169. B. N. P. 161.

<sup>c</sup> See the observations of Lord Ellenborough, in *Barker v. Hodgson*, 3 M. & S. 270, *ante*, 649. But see *Brason v. Dean*, 3 Mod. 39, and *Lucy v. Levington*, 1 Vent. 175. 2 Lev. 26.

<sup>d</sup> *Webb v. Russell*, 3 T. R. 393. *Chaworth v. Phillips*, Mo. 876. *Soprani v. Skurro*, Yelv. 19.

<sup>e</sup> *Andrews v. Needham*, Cro. Eliz. 656. Noy. 75.

<sup>f</sup> *Peckham's Case*, Sav. 132.

<sup>g</sup> *Anon.* 3 Leon. 51.

<sup>h</sup> *Ante*, 244.

charged as to the other party.<sup>a</sup> But though a lessee is discharged from his covenants by bankruptcy, yet, if he be the assignee of the lease, his discharge will not relieve the original lessee from his personal covenant with the lessor, the privity of contract not being destroyed. The statute is confined to cases between the lessor and the lessee, and does not comprise cases between the lessee and his assignee.<sup>b</sup>

4.—*How a covenant may be discharged by the acts or omission of the covenantee.*] We have seen that a covenantor may be discharged from liability for the non-performance of his contract, by the act of God, or by operation of law; it remains to be observed, that he may be relieved from his engagement also by various acts of the covenantee.

*First*, the covenantor may be discharged by a release. But, as it is a rule of law that a contract by specialty can only be dissolved by an instrument of as high a nature, a release, to operate as a discharge from a covenant, must be by deed.<sup>c</sup>(1) Where the plaintiff, as tenant of a farm, covenanted with the defendant as landlord, to fetch and bring all timber, stone, and other materials, as should, at any time during the continuance of the term, be wanted, about the erecting of a threshing mill, and the latter covenanted to build and erect the same, the defendant pleaded, first, that he began to provide the necessary materials for erecting the mill, and that whilst he was so doing, the plaintiff desired him not to build the same, but refrain from so doing until he should be requested by the plaintiff; and, *\*secondly*, a plea of license. Held, that both these pleas were bad on special demurrer; assigning for causes, that the covenant of the defendant was an absolute and executory covenant under seal, and that the defendant had pleaded only a parol request, alleged to have been made to him by the plaintiff to discharge and release him from his covenant before any breach thereof; and that it did not appear that such covenant was suspended, released, or discharged by any deed under seal.<sup>d</sup> So where the plaintiff covenanted to build houses for 500*l.* by a certain day, and the time was afterwards enlarged by parol, and the houses were finished within the enlarged time; held, that the plaintiff was not entitled to recover on the covenant, as he had not completed the houses within the time mentioned in the original contract, and the *parol* agreement to enlarge the time was not sufficient to dispense with the terms of this deed under seal.<sup>e</sup>

Discharge  
by release

A cove-  
nant can-  
not be di-  
charged  
by parol.

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<sup>a</sup> *Kearsey v. Carstairs*, 2 B. & Ad. 716. (23 Eng. C. L. 175.)

<sup>b</sup> *Manning v. Flight*, 3 B. & Ad. 211. (23 Eng. C. L. 58.) See *Taylor v. Young*, 3 B. & A. 521. (5 Eng. C. L. 364.)

<sup>c</sup> *Co. Litt.* 264, *b.* *Blake's Case*, 6 Co. 44. *Rogers v. Payne*, 2 Wils. 376. See *Head v. Wadham*, 1 East, 619. *Smith v. Wilson*, 8 East, 437.

<sup>d</sup> *Cordwent v. Hunt*, 2 Moore, 660. 8 Taunton, 596. (4 Eng. C. L. 216.)

<sup>e</sup> *Little v. Holland*, 3 T. R. 590.

(1) (See *Reed v. McGraw*, 5 Ohio, 281.)



What will discharge an unbroken covenant.

As no duty or cause of action arises from a covenant before it is broken, an unbroken covenant is not discharged by a release of all actions, suits, demands, causes of action, obligations, &c.<sup>a</sup> But a release of *covenants* is a good discharge of a covenant before it is broken.<sup>b</sup> No particular form of words is necessary to constitute a release, any words expressive of an evident intention to renounce the claim or discharge the covenan-

When one covenant will operate as a release from another.

tor is sufficient.<sup>c</sup> One covenant sometimes operates as a release from another; as if the covenantee of a covenant agrees by specialty to save the covenantor harmless, such an undertaking, though in a deed subsequently executed, to prevent a multiplicity of actions, would be construed as a release, and might be pleaded in bar to an action against the original covenan-

When not.

\*654 nantor.<sup>d</sup> But this rule applies only to cases where the covenantor and covenantee stand alone, for a covenant not to sue one of two joint debtors does not operate as a release to the other.<sup>e</sup> If the obligee of a bond covenant not to sue one of two joint and several obligors, and if he do, that the deed of covenant may be pleaded in bar, he may still sue the other obligor, though a *release* to one would be a release to all; for the covenant is not a release in its nature but only by construction, to avoid circuitry of action; and where he covenants not to sue one, he still has a remedy, and then it shall be construed as a covenant and no more.<sup>f</sup>

Qualified release.

The general words of a release may be qualified by the recital; therefore, where to an action of covenant brought by *S.* against *J.* and another, a release was pleaded, which began by reciting that various disputes were subsisting between *S.* and *J.*, and actions had been brought by them against each other, and that it had been agreed between them that, in order to put an end thereto, *J.* should pay *S.* 150*l.*, and each of them should *execute* a release to the other of *all* actions, causes of actions, and claims which he had against the other, and then proceeded in the usual general words to release all actions whatsoever; held, that the effect of the general words was confined by the recital to actions then commenced, and in which *S.* and *J.* were the parties, and that it could not be pleaded in bar to an action brought by *S.* against *J.* and others jointly, and that parol evidence was admissible to show that, at the time of executing the release, there were mutual actions depending between *S.* and *J.* for other causes than that of the present suit, and for such causes only.<sup>g</sup>

<sup>a</sup> Shep. Touch. 291. 1 Inst. 292, *b.* Hancock v. Field, Cro. Jac. 170. Henn v. Hanson, 1 Lev. 99. Carthage v. Manby, 2 Show. 90. Hall v. Kirby, 2 Dyer, 217.

<sup>b</sup> Reede v. Bullocke, Dy. 56, *b.* Hancock v. Field, *supra*.

<sup>c</sup> Co. Litt. 264. Com. Dig. (Release, A.) Hickmot's Case, 9 Co. 52, *b.*

<sup>d</sup> Lacy v. Kinaston, 1 Lord Raym. 690. Holt, 178. Per Buller, J., in Smith v. Maplebeck, 1 T. R. 446. Hodges v. Smith, Cro. Eliz. 623. Trevett v. Aggas, Willes, 107.

<sup>e</sup> Hutton v. Eyre, 6 Taunt. 289. (1 Eng. C. L. 385.) Lacy v. Kinaston, *supra*.

<sup>f</sup> *Id.* Fitzgerald v. Trant, 11 Mod. 254. Dean v. Newhall, 8 T. R. 168.

<sup>g</sup> Simons v. Johnson, 3 B. & Ad. 175. (23 Eng. C. L. 48.) Payler v. Homer-sham, 4 M. & S. 423. Solly v. Forbes, 2 B. & B. 38. (6 Eng. C. L. 11.)

A release to one of several joint covenantors will in general operate as a discharge of all the parties, though the obligation be several as well as joint; for the debt is in law thereby satisfied.<sup>a</sup> But its legal operation may be restrained by the express terms of the instrument; as if it be given to one of two joint contractors, with a proviso that it should not operate to deprive the plaintiff of any remedy which he otherwise would have against the other.<sup>b</sup> A deed *inter partes* cannot operate as a release to strangers, though it contain apt words of a release.<sup>c</sup>

Release to one of several joint covenantors.

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2dly. The covenantor will be discharged from his contract if by any act or omission of the covenantee he be incapacitated to perform it; as, where the lessors covenanted to find eight men to grind every day at a corn-mill, and the lessee pulled down the corn-mill and made it a horse-mill; held, that the lessors were discharged from their covenant.<sup>d</sup> So, if A. covenants that I shall marry a certain woman before such a day, and before that day the covenantee marries her himself;<sup>e</sup> or if he covenants to do such an act as the covenantee shall appoint, and the latter refuses to make the appointment.<sup>f</sup> So, if a lessee for years covenants to drain the water out of the land, or to build a house before a certain day, and the lessor enters before the day and holds the lessee out.<sup>g</sup> So, if the personal attendance of the covenantee be essential, and he absents himself.<sup>h</sup> So, if he omits to do an act which is necessary to legalize the performance of the covenant; as where the defendant covenanted with the plaintiff to come over to England to dance ballets at the King's Theatre, but never came; and it appeared that no license was granted for that theatre as required by 10 Geo. II, c. 28; held, a fatal objection to an action on the covenant, for the plaintiff was not entitled to recover for a breach of an agreement which without such license could not be lawfully executed.<sup>i</sup>

The conduct of the covenantee will sometimes operate as a discharge of the covenantor.

3dly. The covenantor may be discharged by intermarriage with the covenantee; "If the obligee take the obligor to husband, it is a release in law."<sup>j</sup> Upon this point, however, it is to be observed that marriage will not avoid a contract between the parties upon which a right of action cannot accrue during the coverture. The distinction appears to be, that if a covenant be made for the payment of a sum of money due, or the performance of any other act to be done in *presenti*, or which may

Discharge by intermarriage.

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<sup>a</sup> Co. Litt. 232. 2 Rol. Ab. 410. See Cocks v. Nash, 9 Bing. 341. (23 Eng. C. L. 300.)

<sup>b</sup> Salby v. Forbes, *supra*. Twopenny v. Young, 3 B. & C. 211. (10 Eng. C. L. 54.) Lancaster v. Harrison, 6 Bing. 726. (19 Eng. C. L. 216.)

<sup>c</sup> Storer v. Gordon, 3 M. & S. 308.

<sup>d</sup> The city of London v. Greyme, Cro. Jac. 181.

<sup>e</sup> Co. Litt. 206. Bridges v. Beddingfield, 2 Mod. 28. Lutw. 693.

<sup>f</sup> Studholm v. Mandell, 1 Lord Raym. 279.

<sup>g</sup> Carrell v. Read, Cro. Eliz. 374. Anon. Kiehw. 34.

<sup>h</sup> Rol. Ab. "Condition," N. Pl. 2.

<sup>i</sup> Gallini v. Laborie, 5 T. R. 242.

<sup>j</sup> Co. Litt. 264, l.

become payable, or necessary to be performed at some period during the coverture, such covenant is annulled by the intermarriage; but where the covenant cannot, from its nature, confer a right of action during the existence of the coverture, it is not avoided by the intermarriage of the parties, but suspended only during the coverture. As where a bond conditioned for the payment of money after the obligor's death, was made to a woman in contemplation of the obligor's marrying her, and intended for her benefit if she should survive him; it was held, not to be released by their intermarriage, and the heir of the obligor was liable on it.<sup>a</sup>

A material alteration in the instrument will sometimes operate as a discharge.

4thly. The covenantor may be discharged by an alteration being made in the instrument without his consent. *Any* alteration, however immaterial, made by the covenantee, will avoid the deed, even though the original words of the instrument be still legible, and though it tend to his own disadvantage and to the advantage of the covenantor.<sup>b</sup> And if an alteration be made in a material part, even by a stranger, it will avoid it,<sup>c</sup> upon the ground that the alteration may raise a doubt as to its identity.<sup>d</sup> But an alteration made by a stranger in an immaterial part, without the privity or default of the covenantee, will not vitiate it.<sup>e</sup>

\*657 Where, in a bond conditioned "for the payment of one hundred pounds by instalments, till the full sum of one pounds be paid," the word hundred having been omitted in the second place where it occurred in the condition; held, that the insertion of it by a stranger, was an immaterial alteration, and did not avoid the instrument.<sup>f</sup>

Where a little boy tore a seal off a deed, it was held not to avoid it.<sup>g</sup> By a voluntary destruction of one of the seals of a deed, when the covenants therein are joint, both the covenantors are discharged from the covenants; but where they are several, the breaking of one of the seals will invalidate the instrument so far only as concerns him whose seal is torn away.<sup>h</sup> Where a deed bears marks of erasure or alterations, it is incumbent on the party who seeks to derive a benefit from it, to show that the alteration or erasure was made under such cir-

<sup>a</sup> Milbourn v. Ewart, 5 T. R. 381. Cage v. Acton, 1 Lord Raym. 515. Though these decisions related to bonds, it is apprehended that the principle is equally applicable to covenants.

<sup>b</sup> Pigott's case, 11 Co. 26, b. Shep. Touch. 69. B. N. P. 267. Com. Dig. Fait (F. 1). Master v. Miller, 4 T. R. 320. "The reason is because no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event if it is detected." Per Lord Kenyon, C. J., 4 T. R. 329. As to the effect of an alteration in bills or notes, see ante, 388.

<sup>c</sup> Id.

<sup>d</sup> Per Dallas, C. J., in Saunderson v. Simons, 1 B. & B. 430. (5 Eng. C. L. 134.) 4 Moore, 46. But this reason fails if it be identified.

<sup>e</sup> Pigott's case, supra.

<sup>f</sup> Waugh v. Bussell, 1 Marsh. 214-311. 5 Taunt. 707. (1 Eng. C. L. 241.)

<sup>g</sup> Argoll v. Cheney, Palmer, 402.

<sup>h</sup> Mathewson v. Lydiate, Cro. Eliz. 408-470. 5 Co. 22, l.

cumstances as not to avoid it.<sup>a</sup> An alteration in any covenant will avoid a deed, for the deed cannot be the same unless every covenant be the same.<sup>b</sup>

## SECTION XIV.

### OF THE ACTION OF COVENANT AND THE PARTIES THERETO.

HAVING considered the nature of different covenants it may be observed that, for a breach of covenant an action of covenant lies to recover damages for the injury which the covenantee may have thereby sustained; but this form of action can only be resorted to in cases where there is a contract under seal.<sup>(1)</sup> Where a deed contains a contract, express or implied, for the payment of a sum of money, debt and covenant are concurrent remedies, but where the damages are unliquidated, covenant is the only remedy. By the 3 & 4 W. IV, c. 42, s. 3, actions of covenant shall be commenced and sued within ten years from the passing of that act, or within twenty years after the cause of such action, and not after.

When an action of covenant will lie.

By the common law, none but parties or privies to express covenants were bound by, or could take advantage of them. \*To remedy the inconvenience resulting from that rule, the 32 H. VIII, c. 34, extended to grantors of reversions and assignees the same advantages in respect of covenants as the grantors or lessors had at common law.<sup>c</sup> The surrenderee of a copyhold is an assignee of the reversion within the meaning of this statute, and may maintain an action on a covenant in a lease made by his surrenderor.<sup>d</sup> In all cases this action may be maintained against the parties to the contract and their personal representatives, but to render the covenantor liable he must have executed the deed, that is, he must have sealed and delivered it to the covenantee; signing is not a necessary ingredi-

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Of the parties to an action of covenant.

<sup>a</sup> 11 Co. 28, b. B. N. P. 267.

<sup>b</sup> Johnson v. The Duke of Marlborough, 2 Stark. 313. (3 Eng. C. L. 360.) Bishop v. Chambre, M. & M. 116. (14 Eng. C. L. 207.)

<sup>c</sup> See Isherwood v. Oldknow, 3 M. & S. 394. Vernon v. Smith, 5 B. & A. 10. (7 Eng. C. L. 3.) Twynam v. Pickard, 2 B. & A. 105. Webb v. Russell, 3 T. R. 393, post.

<sup>d</sup> Whitton v. Peacock, 3 Mylne & K. 325.

(1) (Covenant cannot be sustained for rent against a lessee in a lease sealed and subscribed only by the lessors, although such lessee has actually entered into possession under the lease. *Hocking Co. v. Spencer*, 7 Ohio, Rep. [Part 2,] 151. An action of covenant lies on a specialty exclusively, and not on a specialty modified or enlarged by simple contract. The altering of a sealed contract by parol, makes it all parol. *Vicary v. Moore*, 2 Watts, 451. *Luciani v. The American Fire Insurance Company*, 2 Wharton, 167. *Langworthy v. Smith*, 2 Wend. 587.)

ent in the execution; but the covenantee may sue on the deed without having executed it.<sup>a</sup>

But where in covenant for nonpayment of rent, the declaration alleged that four persons had demised by indenture a certain tenement to the defendant, and at the trial the plaintiffs produced the counterpart executed by the defendant; whereupon the defendant put in the lease, by which it appeared that only two of the plaintiffs had executed it; held, to be a fatal variance, and that the plaintiffs were not entitled to recover; for the allegation was that four demised by *indenture*, which imported to be an operative indenture; but to render it a valid instrument it should have been executed by the four.<sup>b</sup> So, where a lessor covenanted to give to the lessee a lease for eleven years, and the lessor neither granted the lease nor executed the covenant; it was held, that the reversioner could not sustain an action on the covenant against the lessee, though the latter had executed the covenant.<sup>c</sup>

\*659 It is a general rule of law, that where a deed is made *inter partes*, no person can maintain an action thereon, who is not a party to it.<sup>(1)</sup> Therefore, where in covenant upon an indenture of lease, it appeared that the landlord by writing, *\*not under seal*, authorised his attorney to execute a lease for and on his landlord's behalf, and the attorney signed and sealed the lease in his own name; held, that the landlord could not maintain covenant against the tenant upon the indenture, although the covenants were expressly stated to have been made by the tenant to and with the landlord. The attorney's authority not being under seal was not sufficient, and supposing that it was, he ought to have executed the deed in the name of the principal.<sup>d</sup> So where by a lease rent was reserved to a person who was not a party to the lease, and the lessees covenanted with him and the lessors to pay the rent; it was held, that covenant would not lie at the suit of him and the lessors; for he was a stranger to the indenture.<sup>e</sup>

Besides the right which is founded on a privity of contract in covenants running with the land, this action lies by or against parties on whom the interest in the land has devolved by reason of the privity of estate.

<sup>a</sup> Com. Dig. (Fait. C. 2.) Foster v. Mosses, Cro. Eliz. 212. Rose v. Poulton, 2 B. & Ad. 822. (22 Eng. C. L. 191.) Vernon v. Jefferys, 2 Stra. 1146.

<sup>b</sup> Wilson v. Woolfreys, 6 M. & S. 341.

<sup>c</sup> Cardwell v. Lucas, 2 Mees. & Wels. 111.

<sup>d</sup> Berkeley v. Hardy, 8 D. & R. 102. 5 B. & C. 355. (11 Eng. C. L. 251.)

<sup>e</sup> Southampton (Lord) v. Brown, 6 B. & C. 718. (13 Eng. C. L. 303.) See Hawkins v. Sherman, 3 C. & P. 459. (14 Eng. C. L. 388.)

(1) (Smith v. Emery, 7 Halsted. 53. Spencer v. Field, 10 Wend. 87.)

## SECTION XV.

## THE PARTIES IN JOINT AND SEVERAL COVENANTS.

THE right of action follows the interest in all cases; and, therefore, where the deed is *inter partes*, the party who has the legal interest in the covenant must always sue, although the beneficial interest may be in another.<sup>a</sup> When the parties to the deed are single and in existence at the time of action brought, the course of proceeding is simple, but where there is a joint covenant, the joinder or non-joinder of parties is a question not always free from difficulty. If the interest be several, the action may be several, if joint, it must be joint; and the terms or language of the covenant do not control that principle. Therefore, where *A. B.* and *C.*, for themselves severally, and not jointly, and for their several respective and not joint heirs, executors, &c., covenanted with *D.* and *E.*, and each of them, their and each of their executors, &c., to deliver an abstract of title of their respective interests in certain premises, in consideration whereof, *D.* and *E.* for themselves and their respective heirs, covenanted with *A. B.* and *C.*, and each of them, their and each of their heirs, &c., to pay in the proportions of one moiety to *A.*, his executors, &c., and the other to *B.* and *C.*, their executors, &c., by instalments, and to execute to *A. B.* and *C.*, their heirs, &c., a security by way of mortgage, for payment of such instalments, and as a collateral security, to give their joint and separate bond; held, that on non-payment of the first instalment, by *D.* and *E.*, *A.* might maintain a separate action against them.<sup>b</sup>

The party who has the legal interest must sue.

When the interest is joint, the action must be joint.

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Though a covenant be joint and several in the terms of it, yet if the interest and cause of action be joint, the action must be brought by all the covenantees; and on the other hand, if the interest and cause of action be several, the action can be brought by one only.<sup>c</sup> Where the plaintiff, the defendant, and twelve others, tenants in common of certain lands, entered into a deed, and each one for himself only, and not for the others, covenanted to abide by the award of *A.*, it was objected that all the parties except the defendant ought to have been made plaintiffs, for that each man's covenant was made with all the rest; but the court held, that the action was well brought, as

Where the interest is several.

<sup>a</sup> *Barford v. Stuckey*, 3 B. & B. 333. *Storer v. Gordon*, 3 M. & S. 308. 1 Saund. 154.

<sup>b</sup> *James v. Emery*, 5 Price, 529. 2 Moore, 195. 8 Taunt. 245. (4 Eng. C. L. 89.) 1 Saund. 154.

<sup>c</sup> 1 Saund. 153. Though a man covenant with two or more jointly, yet if the interest and cause of action of the covenantees be several and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint. *Withers v. Bircham*, 3 B. & C. 254. (10 Eng. C. L. 68.)



each party had a separate interest.<sup>a</sup> So where part owners of a ship agreed "each and every of them, with the others and each and every of them," that the ship should be under the management of one of them as husband, and that on her return an account should be taken, and the net profits divided rateably; it was held, that one part owner might sue the ship's husband, without joining the other "part owners."<sup>b</sup> But where

**\*661** Where the one of two covenantees has no beneficial interest whatever, cove- nantees have no beneficial interest. there the action must be joint; therefore, if a man covenant with *A.*, and also with *B.*, to pay an annuity to *A.*, his executors and administrators, during the life of *B.*, this is a joint covenant, and upon *A.*'s death his executors cannot maintain an action, but the right of action survives to *B.* For though the covenant be separate, the legal interest is joint.<sup>c</sup>

Where in consideration of the sum of 300*l.*, *T. D.* and *R. D.* by deed, severally and respectively, and for their several and respective heirs, executors and administrators, granted, covenanted and agreed, to and with *L.* and *B.*, their heirs, executors, administrators, and assigns, to pay *L.* and *B.*, their executors, &c., one annuity or clear yearly sum of 30*l.*, in the shares and proportions following, viz. the sum of 15*l.*, being one moiety of the annuity, unto *L.*, his executors, &c., and the sum of 15*l.*, the remaining moiety, unto *B.*, his executors, &c., to be respectively paid quarterly. The powers for better securing the payment of the annuity contained in the deed were all given to *L.* and *B.* jointly, and the deed also contained a joint power of attorney to them to enter up joint judgment; and a joint power was granted to them to dispose of the reversion of a close of land, with a joint power of attorney to sell certain stock; and the annuity was redeemable, on seven days' notice in writing being given, by the payment to *L.* and *B.* of the sum of 307*l.* 10*s.* and all arrears of the annuity. In an action brought by *L.* against *T. D.*, to recover arrears of the annuity, held, that the covenant was a joint covenant, and that the interest in the annuity was joint, and that *L.* could not sue alone.<sup>d</sup>

**\*662** \*Where in covenant against the executors of *A. B.*, plaintiff declared that *A. B.* covenanted with him and two others, that his executors, &c., should pay to them an annuity for the use of a third person, and averred that the other two never sealed the deed; held, on demurrer, that all joint covenantees who may sue must sue, and that the declaration was bad, inas-

<sup>a</sup> *Johnson v. Wilson*, Willes, 154. 1 Saund. 154, n.

<sup>b</sup> *Owston v. Ogle*, 13 East, 538.

<sup>c</sup> *Anderson v. Martindale*, 1 East, 497. *Southcoate v. Hoare*, 3 Taunt. 87. *Scott v. Godwin*, 1 B. & P. 67. 1 Saund. 154. A covenant will not in all cases accompany the interest taken under a lease; for if two joint lessees covenant jointly and severally for payment of rent, although the interest must survive on the death of one, the executor of the deceased lessee may be sued alone in respect of the several covenant. *Enys v. Donnithorne*, 2 Burr. 1196.

<sup>d</sup> *Lane v. Drinkwater*, 1 C. M. & R. 599. 5 Tyr. 40.

much as it did not appear that any of the covenantees had not assented to the deed, although they did not seal it.<sup>a</sup> If a covenant be made with three persons, and two of them do not seal the deed, yet it is not in law converted into a covenant with one. There are many cases which show that all the covenantees may sue although they have not sealed.<sup>b</sup> Where the master of a vessel covenanted with several owners, and their *several and respective* executors, administrators and assigns, to pay certain moneys to them and to their and every of their several respective executors, &c., at a certain banker's, and in such parts and proportions as were set against their several and respective names; held, a several covenant upon which each covenantee must sue severally in respect of his several interest, and that they could not maintain a joint action.<sup>c</sup>

Several covenants

A joint action is not maintainable against two, on an implied covenant; therefore where in a joint action against *A.* and *B.* on a covenant supposed to be implied as incident to a demise by lease, it appeared on production of the lease, that *A.* only demised and that *B.*, who had an equitable interest only, merely confirmed; it was held that the action was not maintainable against them both.<sup>d</sup>

Where there is a joint covenant by several, all ought to be joined in the action; but where two persons covenant jointly and severally with another, the covenantee may bring an action against one of the covenantors only, though their interest in the subject matter of the covenant be joint. It is not necessary to repeat in every covenant that *each* of the covenantors covenants *\*for himself and his representatives*; the general words introductory to the covenants are sufficient to all the subsequent covenants on their part. Thus, where in a lease of a colliery, the covenants of the lessors ran thus, "and the said *A. B.*, for themselves, jointly and severally, and for their several and respective heirs, &c., did and each of them did promise and agree," &c., then followed covenants by the lessors, then other covenants by the lessees in one of which the words "and each of them" were inserted, and in all the others omitted; the court held, that by reason of the introductory words *all*, the covenants were several as well as joint, and that the lessor might bring an action for a breach of covenant against either of the lessees.<sup>e</sup>

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The following summary of the foregoing decisions, which will be found in a work of eminence,<sup>f</sup> may be conveniently introduced in this place. Where there is no express contract with all, and their legal interest is several, the covenantees

Persons to be joined plaintiffs.

<sup>a</sup> *Petrie v. Bury*, 3 B. & C. 353. (10 Eng. C. L. 103.)

<sup>b</sup> Per Holroyd, J., *id.* 1 Saund. 291, g. See also *Scott v. Godwin*, 1 B. & P. 67.

<sup>c</sup> *Servante v. James*, 10 B. & C. 410. (21 Eng. C. L. 98.)

<sup>d</sup> *Smith v. Pocklington*, 1 C. & J. 445.

<sup>e</sup> *Northumberland (Duke of) v. Errington*, 5 T. R. 592.

<sup>f</sup> See Platt on Cov. 130.

Where the interest is several. *must* sue separately;<sup>a</sup> yet, where the contract is entered into with the covenantees jointly, and the estate taken by them is several, they *may*, at their option, sue jointly or severally; jointly in respect of the joint contract, severally in respect of the interest.<sup>b</sup> And if there are three covenantees taking distinct interests, two of them may support an action without joining the third though living,<sup>c</sup> and the executor or administrator of each several covenantee stands in the situation of the deceased.<sup>d</sup>

Where the interest is joint. On the other hand, where a joint interest is created, the covenantees cannot sever in action;<sup>e</sup> nor can any words of severalty relieve them from the necessity of suing together; even though the covenant be with *each* of *them*, or with them *jointly and severally*.<sup>f</sup> The reason assigned is, that if several were to be permitted to bring distinct actions for one and the same cause, where the interest is joint, the court would be in doubt for which of them to give judgment.<sup>g</sup>

\*664 Persons to be joined as defendants. Where the covenant is several. Where joint. When joint and several. *Quære*, if on a joint and several.

\*Where a covenant is entered into by two or more severally only, a joint action against them cannot be maintained, for at law as well as in equity, the courts will not take cognizance of distinct and separate claims and liabilities of different persons in one suit, though standing in the same relative situations.<sup>h</sup> In actions against joint covenantors they must all be made defendants, but an omission to join them can only be taken advantage of by a plea in abatement;<sup>i</sup> and on the death of one, the joint covenantor incurs all the legal liability, by survivorship, and exonerates the executors of the deceased.<sup>j</sup> The covenantee may recover in execution against one, the whole sum covenanted to be paid, and has nothing to do with contribution between the covenantors.<sup>k</sup> Where the covenant is joint and several, the covenantee may, at his option, sue both or either of the covenantors;<sup>l</sup> and though one of three joint and several covenantors, may by his bankruptcy and certificate be exonerated, the covenantee may proceed against the other two;<sup>m</sup> and on a joint and several covenant, he may sue the executor of a deceased covenantor or the survivor.<sup>n</sup>

It has been doubted whether on a joint and several covenant by three, an action can be supported against two without joining the third then living in an action of *covenant*.<sup>o</sup> It does

<sup>a</sup> Tippet v. Hawkey, 3 Mod. 263.

<sup>c</sup> James v. Emery, *supra*, 659.

<sup>e</sup> Eccleston v. Clipesham, 1 Saund. 153. *v. James, supra*, 662.

<sup>f</sup> *Id.*

<sup>g</sup> Slingby's case, 5 Co. 19, *a.* cited 1 East, 500.

<sup>h</sup> Birkley v. Presgrave, 1 East, 226.

<sup>i</sup> Bac. Ab. "Obligation," (D.) 4. 2 Vern. 99.

<sup>j</sup> Clough v. Clough, 5 Ves. 717. See Brett v. Cumberland, Cro. Jac. 523.

<sup>k</sup> Lilly v. Hodges, 8 Mod. 166. 1 Stra. 553. Enys v. Donnithorne, 2 Burr. 1196.

<sup>m</sup> Baxter v. Nichols, 4 Taunt. 90.

<sup>n</sup> Bac. Ab. Cov. (D.)

<sup>b</sup> 1 Saund. 154, *n.*

<sup>d</sup> Withers v. Bircham, *supra*, 660.

Johnson v. Wilson, *supra*, 660. Servante

<sup>l</sup> 1 Saund. 154, *n.* 1, 291, *n.* 4.

<sup>o</sup> May v. Woodward, Freem. 248.

not appear that there is any decision directly in point, but judging from the analogy between covenants and bonds, the authorities negative the right to such an action. In Rolle's Abridgment it is laid down, "If three be bound jointly and severally, the obligee cannot sue two of them jointly, for this is suing them neither jointly nor severally." The same doctrine is laid down by Buller, J., in these words, "If three be bound jointly and severally in a bond, the obligee cannot sue two of them only, but he must sue them all, or each of them separately; and though that doctrine has been several times questioned, yet it has been held good law since the time of Lord Coke." <sup>a</sup> ral covenant by three, two only may be sued. \*665

## SECTION XVI.

### WHEN THE HEIR MAY BE A PARTY.

**COVENANTS** which run with the land, and are for the interest of the reversion descend to the heir of the covenantee, and must be taken advantage of by him. As if one covenant with another and his heirs to infeoff him and his heirs of the manor of *D.*, if he will not do it, and he to whom the covenant is made dies, the heir shall have an action of covenant upon the deed.<sup>b</sup> Even in cases in which a breach has been committed during the lifetime of the testator, the heir's title to bring an action is preferred to that of the executor, if no damage has been sustained by the testator, or if the estate has not been prejudiced during his life.<sup>c</sup> Nor is it in all cases necessary that the heir should be named in the deed to entitle him to sue. As where the lessee covenanted with the lessor, his executors and administrators, to repair; it was held, that the heir of the lessor, though not named, might bring an action against the lessee for not repairing.<sup>d</sup> It is not necessary for a party entitling himself to an action as heir to his father, to show that the father had some estate; but it is otherwise where he declares on his own demise.<sup>e</sup> Where the heir may sue on the covenant of his ancestor.

To render the heir liable on the covenant of his ancestor, it is necessary that the terms of the covenant specially provide for its performance by him; and that he have assets by descent When the heir is liable to be

<sup>a</sup> *Strathfield v. Halliday*, 3 T. R. 782.

<sup>b</sup> F. N. B. 146. *Wotton v. Cooke*, Dy. 337.

<sup>c</sup> *Kingdon v. Nottle*, 1 M. & S. 355. *Jones v. King*, 4 M. & S. 188. *King v. Jones*, 5 Taunton, 418. (1 Eng. C. L. 139.)

<sup>d</sup> *Loughler v. Williams*, 2 Lev. 92; and see *Sacheverell v. Froggatt*, 2 Saund. 367.

<sup>e</sup> *Willett v. —*, Holt, 568. Platt, 518. It is said, that a covenant will in all cases run with the land in favor of the heir, unless an evident intention be manifested to confine it to the covenantee; in case of warranty, however, a different law prevails, *id.* *Roe d. Bamford v. Haley*, 12 East, 464. Co. Litt. 384.

sued on  
the cove-  
nant of his  
ancestor.

\*from the covenantor to answer the claim:<sup>a</sup> for though the covenant descends to the heir whether he inherits any estate or not, it lies dormant, and is not compulsory until he has assets by descent.<sup>b</sup> In covenant which runs with the land, evidence that the defendant is in *as heir* will support a declaration charging him as assignee; for whether he were in possession as assignee, or heir at law, he is equally liable on this covenant.<sup>c</sup> Where the covenant arises by implication of law, as where a lease is granted with the words "*yielding and paying*," which create an implied covenant, an action for non-payment will not lie against the heir, as he cannot be named therein.<sup>d</sup>

In an action against the heir, the declaration need not allege that he had lands by descent; for as the want of assets is a good defence, the defendant may plead that he had none.<sup>e</sup>

Liability  
of the heir  
and de-  
visee.

By the 11 Geo. IV, & 1 W. IV, c. 47, (repealing the 3 W. & M. c. 14, the 6 & 7 W. III, c. 14, the 4 Anne, c. 5, and 47 Geo. III, c. 74,) all wills, testamentary limitations, dispositions or appointments made by any person of or concerning any manors, lands, hereditaments, &c., or any rent, profit, or charge out of the same, whereof any person at the time of his decease shall be seised in fee, reversion, or remainder, or shall have power to dispose of by will, shall be taken as against the person with whom the testator shall have entered into any bond, covenant, or other specialty, binding his heirs to be void. By sec. 3, every creditor by bond, covenant, or other specialty, may maintain an action of debt or covenant against the heir and such devisees, or the devisees of such devisees jointly; and such devisees shall be liable for a false plea in the same manner as the heir would be, or for not confessing the lands or tenements descended. By sec. 4, if there be no heir at law, actions may be maintained against the devisees alone. By sects. 6 and 8, the heir and devisee are each made answerable for debts, although they may sell the estate before action brought, to the value of the lands sold.

\*667 An action of debt by a covenantee against the devisees of a \*covenantor will not lie under the statute of 3 W. & M. c. 14, where the covenantor is only a surety, and the breach of covenant did not take place in his lifetime.<sup>f</sup>

<sup>a</sup> 2 Bl. Com. 243. Shep. Touch. 178. Co. Lit. 374, b. Dyke v. Sweetin, Willes, 585.

<sup>b</sup> 2 Bl. Com. 243.

<sup>c</sup> Derisley v. Custance, 4 T. R. 75.

<sup>d</sup> Newton v. Osborne, Sty. 387.

<sup>e</sup> Dyke v. Sweeting, Willes, 585.

<sup>f</sup> Farley v. Briant, 1 Harr. & Woll. 299. 5 N. & M. 42. See post, title "Debt."

## SECTION XVII.

## WHEN EXECUTORS AND ADMINISTRATORS MAY BE PARTIES.

EXECUTORS and administrators may sue on personal covenants made by the testator or intestate, in respect of contracts relating to the realty, where a damage has been sustained in his lifetime.<sup>a</sup> If a termor for years underlets, and dies possessed of the reversion, his executors only can sue for damages for the non-performance of the covenant, whether the breaches were incurred previous or subsequent to the death of the testator.<sup>b</sup> If a lessor covenant with a lessee to make him a new lease at the end of his term, and the lessee dies, his executor may have an action of covenant on this, though not named.<sup>c</sup> But where the testator purchased an estate in fee simple, with the usual covenants for title; it was held that the executor could not maintain an action on a mere breach of the covenant for seisin. The breach should be assigned specially, with a view to compensation for damage sustained in the lifetime of the testator, or the executor should show that he claimed some interest in the premises as assignee or otherwise.<sup>d</sup> But if, in consequence of the breach of covenant for seisin, the testator was prevented from selling, this would be sufficient to vest a right of action in the executor.<sup>e</sup>

When ex-  
ecutors  
may sue  
on cove-  
nants of  
testators.

Upon a covenant by a lessee not to fell timber or cut wood, it was held that the executor of the lessor might maintain an action for a breach in the lifetime of his testator.<sup>f</sup> Executors, though not named, may sue on a covenant made with the testator in reference to a chattel.<sup>g</sup>

\*Where a lessee for years under-demised for a term longer than the residue held by him, the under lessee covenanting to pay to the lessee, his executors and administrators, the yearly sum of 75*l.* by quarterly payments, held that, notwithstanding the instrument amounted to an assignment, inasmuch as all the lessee's term was thereby conveyed; covenant lay at the suit of the executor of the lessee, to recover arrears of this rent accruing during the continuance of the lessee's term.<sup>h</sup>

\*668

Liability  
of execu-  
tors and  
adminis-  
trators on  
covenants  
of the de-  
ceased.

The executors or administrators are liable in respect of assets for covenants broken in the testator's lifetime, and for the performance after his death of such covenants as relate to

<sup>a</sup> F. N. B. 145, D.

<sup>b</sup> Mackay v. Mackreth, 2 Chitty, 461. (18 Eng. C. L. 396.)

<sup>c</sup> Plowd. 286.

<sup>d</sup> Kingdon v. Nottle, 1 M. & S. 355. 4 *id.* 53. Chamberlain v. Williamson, 2 M. & S. 406.

<sup>e</sup> *Id.*

<sup>f</sup> Raymond v. Fitch, 2 C. M. & R. 588. 1 Gale, 337.

<sup>g</sup> Doe d. Rogers v. Rogers, 2 N. & M. 550.

<sup>h</sup> Baker v. Gostling, 4 M. & Scott, 539. 1 Bing. N. C. 19. (27 Eng. C. L. 292.)



the personalty, as to pay a sum of money, &c.<sup>a</sup> And this, notwithstanding the party covenants for himself and assigns, without mentioning executors, for an executor or administrator is an assignee in law.<sup>b</sup> And as long as the executor has assets he must perform the covenants contained in a lease granted to his testator; nor will an assignment, even with the acceptance of the rent by the lessor of the assignee relieve the executor from liability.<sup>c</sup> But covenants which require personal performance by the covenantor, do not extend to his executors or administrators, except in case of a breach committed in his lifetime.<sup>d</sup> As if a lessee for years covenants for himself to repair the houses demised, omitting other words, his executors are not bound to repair after his death.<sup>e</sup>

For breaches of covenant by the testator himself, the executor is chargeable *de bonis testatoris* only;<sup>f</sup> and unless he enter on the property demised, he is not chargeable *de bonis propriis*, though the covenant be broken after the death of the testator.<sup>g</sup> But after an entry by the executor on the premises \*the lessor may sue him for breaches in his own time, either as executor or assignee;<sup>h</sup> and if he be sued as assignee, the judgment will be *de bonis propriis*.<sup>i</sup>

Where an executor who had occupied premises held by his testator under a lease, with covenants for payment of rent and taxes, and to keep the premises in repair, was sued in covenant as assignee, in respect of the privity of estate, held, that he was liable on the covenant for payment of rent and taxes to the extent only of the profits; but that for a breach of the covenant to repair, he was liable to the same extent that any other assignee would be liable.<sup>j</sup> In covenant against an executor, sued as an assignee, for breaches of covenants to pay rent and to repair, incurred in his time, it was pleaded, first, that the defendant was executor of the lessee, that the premises vested in him as such executor only, and not otherwise, that the profits of the demised premises at the time he became executor, and since that time hitherto, were less than the rent reserved, and that the defendant had paid to the plaintiffs before commencing the suit 255*l.*, being all that remained in his hands of the

<sup>a</sup> *Hyde v. Skinner*, 2 P. Wms. 197. F. N. B. 145. Shep. Touch. 78-482. Rushden's case, Dy. 4.

<sup>b</sup> *Anon.* 1 Bulstr. 23.

<sup>c</sup> *Pitcher v. Tovey*, 1 Salk. 81. *Wilkins v. Fry*, 1 Meriv. 265. *Brett v. Cumberland*, Cro. Jac. 522.

<sup>d</sup> *Hyde v. The Dean of Windsor*, Cro. Eliz. 553. See *ante*, 616.

<sup>e</sup> Shep. Touch. 178.

<sup>f</sup> *Jevens v. Harridge*, 1 Saund. 1.

<sup>g</sup> *Collins v. Thoroughgood*, Hob. 188. *Bull v. Wheeler*, Cro. Jac. 647. *Dean and Chapter of Bristol v. Guise*, 1 Saund. 111. *Bridgman v. Lightfoot*, Cro. Jac. 671. *Platt on Cov.* 458.

<sup>h</sup> *Buckley v. Pirk*, 1 Salk. 317. *Lyddall v. Dunlapp*, 1 Wils. 4.

<sup>i</sup> *Wilson v. Wigg*, 10 East, 313. *Tilney v. Norris*, Carth. 519. 1 Salk. 309. *Ld. Raym.* 553.

<sup>j</sup> *Tremeere v. Morrison*, 4 M. & Scott, 603. 1 Bing. N. C. 89. (27 Eng. C. L. 315.)

said profits by him at any time received therefrom, and that he had never since received any such profit; held, on special demurrer, to be insufficient, for not stating that the defendant had no other assets of the deceased, which had come to his hands as executor to be administered.<sup>a</sup> It seems that an offer by an executor to a lessor to surrender to him a lease granted to his testator, is an answer to an action of covenant against him as assignee for breaches of a covenant to repair, as to all breaches accruing after that offer.<sup>b</sup>

## \*SECTION XVIII.

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## WHEN ASSIGNEES MAY BE PARTIES.

COVENANTS which run with the land will confer a right of action on the assignee though not named therein;<sup>c</sup> as in case of a breach of covenant to renew,<sup>d</sup> or for quiet enjoyment, whether the interest assigned be an estate of inheritance or a chattel interest only; and whether any estate remain in the covenantor or not,<sup>e</sup> or for further assurance.<sup>f</sup>(1) So persons coming in by act of the law, such as tenant by statute merchant or statute staple, or elegit of a term, and he to whom a lease for years is sold by force of any execution, are also entitled to have an action, on a covenant annexed to the land in the same manner, as a person claiming by act of the party.<sup>g</sup> As a right of action on a covenant cannot be assigned at law,<sup>h</sup> it follows that a covenant broken in the time of the lessor cannot be the foundation of an action by his assignee,<sup>i</sup> unless the breach be continued after the assignment; as if a lessee covenants to repair within a certain time after notice, and omits to repair after notice by the assignee of the reversion, the assignee may bring an action, though the premises were out of repair before the assignment.<sup>j</sup>

<sup>a</sup> Reid v. Tenterden, (Lord,) 4 Tyr. 111.<sup>b</sup> Id.<sup>c</sup> Spencer's case, Co. 17, b. Platt on Cov. 523. As to covenants which run with the land, see *ante*, 617.<sup>d</sup> Skerne's case, Mo. 27.<sup>e</sup> Lewis v. Campbell, 8 Taunt. 715. (4 Eng. C. L. 258.) 3 B. & A. 392, (5 Eng. C. L. 322,) in Error.<sup>f</sup> Middlemore v. Goodale, Cro. Car. 503.<sup>g</sup> 5 Co. 17, a.<sup>h</sup> Lewis v. Ridge, Cro. Eliz. 863. Per Mansfield, C. J., in Andrews v. Pearce, 1 N. R. 163.<sup>i</sup> Canham v. Rust, 8 Taunt. 227. (4 Eng. C. L. 80.)<sup>j</sup> Mascal's case, Moore, 242. 1 Leo. 62.

(1) (The assignee of a fee-farm rent being an estate of inheritance is, upon the principles of the Common Law, entitled to sue, therefore, in his own name. It is an exception from the general rule, that choses in action cannot be transferred, and stands upon the ground of being not a mere personal debt, but a perdurable inheritance. *Scott v. Lunt*, 7 Peters, 596.)

The statute 32 Hen. VIII, c. 34, gives to the grantees and assignees of a reversion, the same remedies against the lessee or his assignee, or their personal representatives, upon covenants running with the land, as the lessor, or his heir, or their ancestor had at common law. It also gives to the lessees the same remedy against the grantees of the reversion, which they might have had against their grantors. Therefore, under this statute the grantees or assignees stand in the same situation and have the same remedy against their lessees, as the heirs at law  
 \*671 \*of individuals.\* This statute was passed to remedy the doctrine of the common law, "*that no stranger to any covenant should take advantage of the same,*" and the effect of it is to transfer the privity of contract from reversioner to reversioner, and to enable persons not strictly privies thereto to sue upon covenants in cases where the common law did not entitle them.<sup>b</sup> Under this statute it has been decided, that the surrenderee of a copyhold reversion may bring covenant against the lessee, for it is a remedial act, and no prejudice can arise against the lord.<sup>c</sup> So the assignee of a reversion for years may bring an action against the underlessee on a covenant to leave the premises in repair.<sup>d</sup> So an action will lie by the assignee of the reversion of part of the demised premises against the lessee for not repairing,<sup>e</sup> and so it will lie by the lessor against the assignee of the lessee's assignee, though he be assignee of a part only of the premises demised, for he is liable while he enjoys.<sup>f</sup> The grantee for life of a reversion, is assignee within the statute, and may enter for condition broken.<sup>g</sup> So a remainderman is assignee of the reversion, and may bring covenant on a lease made by a tenant for life under a leasing power.<sup>h</sup> There is no difference between the right of an assignee of freehold, and that of an assignee of chattel real, to sue on covenants running with the land.<sup>i</sup> But in order that the assignee may sue, he must be in of the same estate in the land which the party had with whom the covenant was originally made, for the covenant is incident to that estate.<sup>j</sup>

Liability  
of as-  
signees

An assignee is liable to be sued on all the covenants which run with the land, though he be not named therein.<sup>(1)</sup> But he is not liable on a mere collateral or personal covenant, even

<sup>a</sup> Webb v. Russell, 3 T. R. 393.

<sup>b</sup> Thursby v. Plant, 1 Saund. 237. Isherwood v. Oldknow, 3 M. & S. 395.

<sup>c</sup> Glover v. Cope, 1 Salk. 185.

<sup>d</sup> Yates v. Cole, 2 B. & B. 660. (6 Eng. C. L. 305.) 5 Moore, 554. See Whitton v. Peacock, 3 Mil. & K. 325, *ante*, 658. S. C., but not S. P. 2 Bing. N. C. 44, *post*, 698.

<sup>e</sup> Twynam v. Pickard, 2 B. & A. 105.

<sup>f</sup> Cougham v. King, Cro. Car. 221.

<sup>g</sup> Kidwilly v. Brand, Plow. 72.

<sup>h</sup> Isherwood v. Oldknow, 3 M. & S. 382.

<sup>i</sup> Noke v. Awder, Cro. Eliz. 373. Lewis v. Campbell, 8 Taunton, 715. (4 Eng. C. L. 258.)

<sup>j</sup> See Smith's Leading Cases, 27 et seq., where this subject is very ably considered.

(1) (See *Fulton v. Stuart*, 1 Ohio, 369.)

though \*he be named.\* The liability of the assignee arises for breach from the privity of estate, and continues only while he is in possession under the assignment, except in case of rent, for which, though he assigns over, he is notwithstanding liable for the arrears incurred before, as well as during his enjoyment.<sup>b</sup> He also continues liable for any breach incurred after the assignment to him and before the assignment over.<sup>c</sup> But he is not liable for a breach committed after he has assigned over, though he continue in possession, and his assignee has not taken possession, for the possession in law is in the second assignee by virtue of the assignment.<sup>d</sup> Executors or administrators of a lessee may be sued as *assignees* of the term if they accept the term, though if one of two executors of a lessee enter, such entry does not enure as the entry of both, so as to make them jointly liable to an action for use and occupation.<sup>e</sup> The assignees of a lease, whereby the lessee covenanted for himself and his assigns absolutely to repair premises without qualification, is bound to repair, notwithstanding they are destroyed by fire.<sup>f</sup>

The devisee of the equity of redemption (the legal fee being in the mortgagee) is not liable in covenant as assignee of all the estate, right, title, and interest of the original covenantor.<sup>g</sup>

\*A trustee, to whom two leases were assigned in trust for securing an annuity, having said to the occupier of one of the demised houses, "You must pay the rent to me; I am become landlord for my client who has the annuity, and you must pay the ground rents for me;" held, that the trustee was liable in covenant to the lessor, as assignee of both trustees, for nonpayment of rent and not repairing.<sup>h</sup>

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<sup>a</sup> See *ante*, 616. *Mayo v. Buckhurst*, Cro. Jac. 438. *Mayor of Congleton v. Patison*, 10 East, 130.

<sup>b</sup> Bac. Ab. Cov. (E. 4.) *Onslow v. Currie*, 2 Madd. 343. *Harley v. King*, *infra*. *Treacle v. Coke*, 1 Vern. 165.

<sup>c</sup> *Harley v. King*, 1 Gale, 100. 2 C. M. & R. 18.

<sup>d</sup> *Taylor v. Shum*, 1 B. & P. 21. *Walker v. Reeves*, Doug. 461, *n*. *Chancellor v. Poole*, Doug. 764. Covenant on non-payment of rent will lie against the assignee of a lease, though he has never entered or taken actual possession, for the title passes, and he becomes possessed in law by the assignment. *Williams v. Bosanquet*, 1 B. & B. 238. (5 Eng. C. L. 72.) 3 Moore, 500. *Burton v. Barclay*, 7 Bing. 745. (20 Eng. C. L. 315.)

<sup>e</sup> *Nation v. Tozer*, 1 C. M. & R. 172.

<sup>f</sup> *Bullock v. Dommitt*, 2 Chitty, 608. (18 Eng. C. L. 431.)

<sup>g</sup> *Carlisle v. Blamire*, 8 East, 487. Where a lessee of tithes covenanted for himself and his assigns not to take tithes in kind from the other party, (the owner of lands in the parish,) nor from his tenants, but to accept a reasonable composition, not exceeding three shillings and sixpence per acre, it was held that his under-lessee of the tithes was not an assignee within the meaning of the covenant, and was not bound by such a covenant of the lessee. *Brewer v. Hill*, 2 Anst. 413.

<sup>h</sup> *Gretton v. Diggles*, 4 Taunton, 766.

## SECTION XIX.

## THE DECLARATION.

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## Venue.

1.—*The venue.*] WHERE the action is founded upon privity of contract the venue is transitory, but where it is founded on privity of estate the venue is local, and must be laid in the county where the lands are situate.<sup>a</sup> The venue is *transitory* in action between the lessor and the lessee, and between the assignee of the reversion and the lessee.<sup>b</sup> It is *local* in actions between the lessor and the assignee of the lessee,<sup>c</sup> and between the assignee of the reversion and the assignee of the lessee.<sup>d</sup> Where the venue is local, if there be several facts material to the plaintiff arising in different counties, the plaintiff may lay the venue in either.<sup>e</sup>

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Where in covenant by the assignee of the lessee against the lessor in respect of lands situate in Surrey, the venue was laid in Middlesex, but as the locality did not appear on the declaration, it was held, that there being no issue on the locality, it was no ground of nonsuit, and that the objection was aided by verdict under 16 & 17 Car. II, c. 8.<sup>f</sup>

## Statement of sealing.

2.—*Statement of the deed, contract, and title.*] As an action of covenant can only be maintained on a deed, the declaration must show on the face of it that it was brought on one. There are some words of art such as *indenture*, *deed*, *writing obligatory*, which of themselves import that the instrument was sealed by the party, without an averment of sealing. If,

<sup>a</sup> There is much confusion in the books respecting privity of estate and privity of contract. Perhaps the best way of reconciling the cases is by considering that, at common law, covenants ran with the land, but not with the reversion; therefore the assignee of the lessee was held to be liable in covenant and to be entitled to bring covenant, but the assignee of the lessor was not; yet as this liability and right in the assignee of the lessee arises out of his privity of estate, and of the annexation of the covenants to the land, all the actions by and against him are local; whereas the assignee of the lessor having no liability or right, except what is given him by 32 H. VIII, his action is transitory by the operation of the statute, except indeed in debt for rent, which he is entitled to independent of all contract, by the mere relation in which he stands to the land. 1 Saund. 210, 5th ed.

<sup>b</sup> By the statute 32 Hen. VIII, c. 34. Thursby v. Plant, 1 Saund. 237.

<sup>c</sup> Stevenson v. Lambard, 2 East, 575. Berwick v. Shanks, 11 Moore, 372. 3 Bing. 459. (13 Eng. C. L. 52.)

<sup>d</sup> Barker v. Damer, Carth. 182.

<sup>e</sup> The Mayor of London v. Cole, 7 T. R. 583.

<sup>f</sup> Boyes v. Hewetson, 2 Bing. N. C. 575. (29 Eng. C. L. 428.)

therefore, the declaration states that *J. S.* by his *deed*, or by *indenture*, covenanted, &c., without averring in either of those cases that he *sealed*, it will be sufficient.<sup>a</sup> The *delivery* of the deed, though essential to its validity, need not be stated, and though dated on a particular day, a deed may be stated in pleading to have been made on another day;<sup>b</sup> as a *deed* is *alleged*, and the plaintiff claims under it, he must make a *profert* of it in the declaration,<sup>c</sup> or state some excuse for the omission of the *profert*, as that the deed was lost or destroyed.<sup>d</sup>

In setting out the contract it will be sufficient to state it according to its legal operation and effect.<sup>e</sup> The proper mode of declaring in covenant on a lease is to set out, that by indenture certain premises therein mentioned were demised, without stating them particularly, subject among other things to a proviso, *\*setting out the substance of the covenant and the breach.*<sup>f</sup>

Statement of the contract.

Where the declaration alleged that by indenture purporting to be made between plaintiff and defendant, it was witnessed that defendant covenanted; held, after plea, sufficiently certain.<sup>g</sup> It is no variance if the plaintiff in his declaration makes *profert* of the "said indenture," and at the trial produces the counterpart executed by the defendant.<sup>h</sup> Where in covenant a defendant craves oyer of the deed, sets it out, and pleads *non est factum*, the deed so set out becomes part of the declaration, and the only question at the trial upon that issue is, whether the deed set out was executed by the defendant. Bayley, J., said, "If a plaintiff states the legal effect of a deed, the defendant has a right to see it on oyer, and if the meaning varies from that attributed to it in the declaration, in order to take advantage of that variance he should plead *non est factum*, without setting out the deed. If it does not support the breach, he should set it out and demur."<sup>i</sup> Where the declaration alleged that the defendant covenanted to pay a certain sum of money at a certain time, upon oyer the covenant appeared to be to pay that sum at a particular place; held, on demurrer not to be a variance.<sup>j</sup> In covenant for the assignment of a share in certain stock, the declaration described it as a covenant to assign a certain sum; on oyer and demurrer, as for a variance, on the ground that the covenant was to assign stock, and not money; held, to be no variance, and even if it were, that the defendant

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Variance.

<sup>a</sup> 1 Saund. 201.

<sup>b</sup> 1 Chitt. Pl. 365.

<sup>c</sup> *Id.* If *profert* be made in the declaration, the defendant may crave oyer, and the deed must be produced, for the plaintiff having made the *profert*, will not be permitted to give evidence of the loss or destruction of it. *Smith v. Woodward*, 4 East, 585.

<sup>d</sup> *Read v. Brookman*, 3 T. R. 151. *Routledge v. Burrell*, 1 H. Bl. 254. *Hendy v. Stephenson*, 10 East, 55.

<sup>e</sup> 1 Chitty, Pl. 367. *Wilson v. Bramhall*, 1 Y. & J. 2.

<sup>f</sup> *Dundas v. Weymouth*, Cowp. 665.

<sup>g</sup> *Baynon v. Batley*, 8 Bing. 256. (21 Eng. C. L. 295.)

<sup>h</sup> *Pearse v. Morrice*, 3 B. & Ad. 396.

<sup>i</sup> *Snell v. Snell*, 7 D. & R. 294. 4 B. & C. 741. (10 Eng. C. L. 453.)

<sup>j</sup> *Paine v. Emery*, 1 Gale, 266. 2 C. M. & R. 304.



could not take advantage of it after oyer.<sup>a</sup> It is no objection under the plea of *non est factum*, that the deed contains material qualifications of the covenant set out, which are not noticed in the declaration.<sup>b</sup>

\*676 In an action of covenant, the declaration stated, that by a certain indenture it was witnessed that, as well in consideration of certain furnaces to be erected by the plaintiff, *T. R. B.* did "demise, &c. The defendant pleaded *non est factum*. On producing the deed in evidence, it appeared to be, that as well in consideration of the erection of the furnaces, "as also for building certain houses and payment of rent, *T. R. B.* did demise," &c.; held, that this was a fatal variance.<sup>c</sup>

In covenant on a lease, a mistake in the name of a person stated in the demise as the late tenant of the premises, is a fatal variance.<sup>d</sup> A variance in setting out one of several covenants in a lease, on which breaches were assigned, viz. the Cellar-beer field, instead of the Aller-beer field, being considered as part of the description of the deed declared on, though the plaintiff waived going for damages on the breach of that covenant, is fatal.<sup>e</sup> In covenant for not repairing, if the covenant to repair contains an exception of "casualties by fire," it is fatal on *non est factum* to state it in the declaration as a general covenant to repair, omitting the exception; and the court of C. P. would not allow the plaintiff to amend on payment of the costs of the trial, but left him to his remedy, by bringing a fresh action.<sup>f</sup> In covenant for not repairing, if the covenant to repair contains an exception of "fire and all other casualties," it is fatal on *non est factum* to state it as a general covenant to repair, omitting the exception.<sup>g</sup>

In an action of covenant on a lease, "of the veins of coal under certain farms and lands therein described, situate in the parishes of *B.* and *M.*, then in the several occupations of *A.*, *B.* and *C.*, with liberty to dig any pits, shafts, levels, soughs," &c., the declaration varied from the deed; first, in stating that the land was set out by admeasurement, instead of by reputation; secondly, by changing the word "soughs" to "sloughs;" thirdly, in stating the lands to be situate in the parish of *B.* and *M.*, instead of the parishes of *B.* and *M.*; and fourthly, in stating them to be in the occupation of *A.*, *B.*, and *C.*, instead of in the several occupations of *A.*, *B.*, and *C.*; held, that the \*677 "first and third variances were fatal; but, that the second and fourth were immaterial.<sup>h</sup> So, where the plaintiff covenanted to build two houses for 500*l.* by a certain day, and averred, in

<sup>a</sup> *Ross v. Parker*, 1 B. & C. 358. (8 Eng. C. L. 100.)

<sup>b</sup> *Gordon v. Gordon*, 1 Stark. 294. (2 Eng. C. L. 396.)

<sup>c</sup> *Swallow v. Beaumont*, 2 B. & A. 765.

<sup>d</sup> *Bowditch v. Mawley*, 1 Camp. 195. Ellenborough.

<sup>e</sup> *Pitt v. Green*, 9 East, 188.

<sup>f</sup> *Brown v. Knill*, 5 Moore, 164. 2 B. & B. 395. (6 Eng. C. L. 167.)

<sup>g</sup> *Tempany v. Barnard*, 4 Camp. 20. Ellenborough.

<sup>h</sup> *Morgan v. Edwards*, 6 Taunton, 394. (1 Eng. C. L. 423.)

an action of covenant for the money, that the houses were built in the time; held, that evidence that the time had been enlarged by parol agreement, and the houses finished within the enlarged time, would not support the declaration.\* So where plaintiff declared in covenant, that defendant demised to him a wharf and storehouses, &c., the word in the deed being storehouse: it was held to be a fatal variance, although no breach was assigned upon the demise of the storehouse, but only upon a covenant by defendant, not to suffer a wharf to be erected on his estate to the injury of the said wharf, *per quod* plaintiff was deprived of certain gains which would otherwise have arisen from wharfage dues, store-room, &c.<sup>b</sup>

But where plaintiff declared in covenant on a demise of lands, and the demise was of all that piece or parcel of ground and premises, containing by estimation one acre: held, that this was not a variance, for one piece will satisfy the term lands.<sup>c</sup> In covenant on a lease for not repairing, the instrument was described in the declaration to be made by the plaintiff of the one part, and the defendant of the other. On the production of the lease in evidence, it appeared to have been made by the plaintiff and his wife of the one part, and the defendant of the other; held, that this was no variance, although the premises demised were the property of the wife before marriage.<sup>d</sup>

By recent statutes, the judge at *nisi prius* is empowered to amend the record in cases of variance even during the course of the trial.<sup>e</sup>

When an action is brought by the covenantor himself, it is sufficient to state the contract; but when it is brought by any person who claims by a derivative title from the covenantor, it is necessary to show the manner in which the title is devolved on him, that the court may judge of its sufficiency. The plaintiff therefore must state the seisin and possession of the covenantor, and trace the title downwards through all the intermediate steps to himself. It is not sufficient to state generally that all the covenantor's interest came to him by legal course, as is the case with respect to the derivative title of the covenantor. With respect to the mode of stating the title, there is this difference between estates in fee and particular estates, that the former may be alleged generally, but the commencement of the latter must be shown when they are the ground of action, but not when they are the inducement only; accordingly it has been held, that a declaration in covenant at the suit of an executor of a termor, for a breach of covenant after the death of the termor, should state the interest and title of the latter in the premises; where, therefore, a declaration stated

Statement  
of title.

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\* Littler v. Holland, 3 T. R. 590.

<sup>b</sup> Hoar v. Mill, 4 M. & S. 470.

<sup>c</sup> Birch v. Gibbs, 6 M. & S. 115.

<sup>d</sup> Arnold v. Revault, 4 Moore, 66. 1 B. & B. 443. (5 Eng. C. L. 141.)

<sup>e</sup> 9 G. IV, c. 15; 3 & 4 W. IV, c. 42, s. 23, *post*.

that *A. B.* demised premises to the testator of the plaintiff, (viz. the termor, without stating that *A. B.* was seised in fee or of any other estate,) and that the plaintiff's testator demised them to *C. D.*, and stated a breach of covenant after the death of the testator, it was held ill.<sup>a</sup>

**Husband and wife.** In an action of covenant by the husband of the tenant in fee, he must declare on a seisin in fee in himself and his wife, in right of his wife. If he state that he is seised in his demesne as a freehold in right of his wife, it will be bad on special demurrer.<sup>b</sup> But on an assignment of land by husband and wife, where they are seised to them and the heirs of the husband, it is sufficient to declare as assignee of the husband.<sup>c</sup>

**Hoir.** Where a plaintiff declares as heir at law upon a lease granted by his ancestor, he must show how he is heir at law, a general averment that the demised premises descended to him as cousin and heir at law, is not sufficient.<sup>d</sup>

**\*679** A declaration on a lease which stated that the plaintiffs derived their title from two lessors only, and that two other lessors, who were also parties to the demise, had no interest therein, was supported by the production of the lease, which appeared to be a demise by the four.<sup>e</sup> Where the assignee of the reversion, who sued the defendant in covenant, alleged that the lessor was seised, (without stating of what estate,) and being seised devised to the plaintiff in fee; it was held a sufficient allegation of title after verdict.<sup>f</sup> If an assignee shows a good legal assignment he need not name himself assignee or show the deed of assignment, provided the subject in dispute may be assigned without deed, although the covenant on which the action is brought, ought to be by deed.<sup>g</sup>

3.—*Dependent and independent covenants.*] Where any thing is to be done by the plaintiff before his right of action accrues on the defendant's covenant, performance of that thing must be averred in the declaration; this leads us to the consideration of conditions precedent and mutual conditions, which have been already noticed, under the title "Assumpsit."<sup>h</sup> But though the rules there laid down, and the observations therein made, are equally applicable to actions of covenant, it may not be amiss briefly to advert to these points in this place.(1)

<sup>a</sup> *Mackay v. Mackreth*, 2 Chitty, 461. (18 Eng. C. L. 396.) 4 Doug. 213. (26 Eng. C. L. 319.)

<sup>b</sup> *Polyblank v. Hawkins*, Doug. 329. <sup>c</sup> *Major v. Talbot*, Cro. Car. 285.

<sup>d</sup> *Lidgbird v. Judd*, 7 D. & R. 517. (16 Eng. C. L. 292.)

<sup>e</sup> *Wood v. Day*, 1 Moore, 389. (2 Eng. C. L. 245.)

<sup>f</sup> *Harris v. Beavan*, 4 Bing. 646. (15 Eng. C. L. 96.) 1 M. & P. 633.

<sup>g</sup> *Noke v. Awder*, Cro. Eliz. 373. <sup>h</sup> *Ante*, 114, et seq.

(1) (As to the distinction of covenants into dependent or independent, see the following cases: *Wade v. Merwin*, 11 Pick. 250. *Kane v. Hood*, 13 Pick. 251. *Courcier v. Graham*, 1 Ohio, 154. *McCoy v. Bixbee*, 6 Ohio, 310. *Finley v. Boehme*, 3 Gill & Johns. 42. *McCrelish v. Churchman*, 4 Rawle, 26. *Goodwin v. Lynn*, 4 Wash. C. C. Rep. 714. *Tompkins v. Elliott*, 5 Wend. 498. *Slocum v. Despard*, 5 Wend. 615. *Dakin v. Williams*, 11 Wend. 67. *Betts v. Perrins*, 14 Wend. 219. *Johnson v. Wygant*, 11 Wend. 48.)

There are three kinds of covenants; 1st, such as are called *dependent covenants*, in which the performance of one depends on the prior performance of the other; and therefore until this prior condition be performed, the other party is not liable to an action on his covenant. 2dly, there are *concurrent covenants*, where one party cannot sue the other for a breach of covenant without averring performance, or what is equivalent thereto, on his part. And 3dly, There are *mutual and independent covenants*, where either party may sue the other for a breach of his covenant, without averring performance of the covenants on his (the plaintiff's) part. These shall be noticed separately. It may here be observed, that the dependence or independence of covenants is to be collected from the evidence, sense and meaning of the parties, and however transposed they may be \*in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance. There are no technical words required to make a condition precedent or subsequent; neither does it depend on the circumstance, whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant; for the same words have been construed to operate either the one way or the other, according to the nature of the transaction.\* The rule has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention when once discovered, all technical forms of expression must give way. And one of the means of discovering such intention has been laid down with great accuracy by Lord Ellenborough, in the case of *Ritchie v. Atkinson*,<sup>b</sup> to be this, "that where mutual covenants go to the *whole* of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to *a part*, there a remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent."

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A covenant is dependent in which the performance of one depends on the prior performance of the other; and therefore performance of the prior condition must be averred in the declaration, and proved, to render the other party liable to an action on his covenant. A few instances will illustrate this position.

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nants.

Where the mutual covenants go to the whole consideration on both sides, they are dependent covenants, the one precedent

<sup>1</sup> Per Lord Mansfield, C. J., in *Kingston v. Preston*, Doug. 690. 1 Saund. 320. Per Ashhurst, J., in *Hotham v. The East India Company*, 1 T. R. 645.

<sup>1</sup> 10 East, 295.

<sup>1</sup> Per Tindal, C. J., in *Stavers v. Curling*, 3 Bing. N. C. 368, (32 Eng. C. L.) post, 686-7.

to the other.<sup>a</sup> As where a covenant was entered into by a tenant  
 \*681 \*at all times during the term to repair the premises, and at the termination of the term to yield them in good and tenantable repair, the landlord finding sufficient timber for the repairs during the term, to be cut and carried by the lessee; the court held, on demurrer to the declaration, in an action against the lessee for not repairing, that finding the timber was a condition precedent, the performance of which ought to be averred in the declaration.<sup>b</sup>

So where in a lease for years, containing the usual covenants that the lessee should pay the rent, keep the premises in repair &c., there was a proviso that the lessee might determine the term at the end of the first three or five years, giving six months' previous notice, and that then and from and after the expiration of such notice, and payment of all rents and duties to be paid by lessee, and performance of all his covenants until the end of the three or five years, the indenture should cease and be utterly void; held, that the payment of rent and performance of the other covenants were conditions precedent to the lessee's determining the term at the end of the first three years, and that his merely giving six months' notice, expiring with the first three years, is not sufficient for that purpose.<sup>c</sup>

So where covenant in a charterparty whereby if the ship should be lost or taken, and it should appear by a court martial that the master, &c., had made the best defence they could, the freighter covenanted to pay the value of the ship; held, that holding the court martial was a condition precedent.<sup>d</sup> So where, in articles of agreement for the sale of lands, it was agreed that *A.*, the seller should take, in part of payment, a conveyance of other lands belonging to *B.*, the buyer, and it was also agreed, that all timber trees, which were upon any of the estates, should be valued by appraisers, and paid for by the respective purchasers at a given time; after the contract, *A.* cut down part of the trees, and the court held, in an action by *A.* for non-performance of the contract, that *B.* might plead that *A.* had cut down the trees, and thereby rendered himself

\*682 unable \*to perform his part of the agreement, for the covenant respecting the trees went to the whole of the consideration of that which was to be done by *B.* *A.* covenanted to convey an estate to the defendant, in which all the timber growing on the estate was necessarily included.<sup>e</sup>

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cedent.

Where a day is appointed for the payment of money, and the act in consideration of which the money is to be paid ought to be performed before the day of payment, the performance of the act is a condition precedent.<sup>f</sup> As where freight was

<sup>a</sup> *Boone v. Eyre*, 1 H. Bl. 273. 2 Bl. 1312. See *ante*, 115.

<sup>b</sup> *Thomas v. Cadwallader*, Willes, 496.

<sup>c</sup> *Porter v. Shepherd*, in Error, 6 T. R. 665.

<sup>d</sup> *Davison v. Moore*, 3 Doug. 28. (26 Eng. C. L. 23.)

<sup>e</sup> *Duke of St. Albans v. Shore*, 1 H. Bl. 270. See *Worsley v. Wood*, *ante*, 120.

<sup>f</sup> See *ante*, 114. *Thorpe v. Thorpe*, 1 Lord Raym. 665.

covenanted to be paid within ten days next after the arrival of a ship at her first destined port abroad, and the vessel was lost on her outward voyage; it was held, that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover any freight, and that as the ship was lost, he could not maintain an action on the covenant.<sup>a</sup> So where the defendant covenanted to pay freight, at the rate of so much per standard hundred for deals, *delivered at Liverpool, &c.*, the freight to be paid one fourth in cash on the arrival of the ship, &c., and *before* the ship had arrived at Liverpool she was wrecked, and the deals having been put on shore were delivered to and accepted by the defendant. In an action on the covenant, for a proportionable part of the freight the defendant pleaded that no part of the cargo of deals was delivered at Liverpool, according to the form and effect of the charterparty; and the court held, on demurrer, that the plea was good; for the plaintiff was not entitled to the whole freight, unless he performed the whole voyage, except in cases where the owner of the goods prevented him; nor was he entitled *pro rata* unless under a new agreement. "Perhaps," said Lawrence, J., "the subsequent receipt of these goods by the defendant, might have been evidence of a new contract between the parties, but here the plaintiff has resorted to the original agreement, under which the defendant only engaged to pay in the event of the ship's arrival \*at Liverpool; that event has not happened, and therefore the plaintiff is not entitled to recover."<sup>b</sup>

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Where there are mutual conditions or reciprocal acts to be performed at the same time, they are technically termed *concurrent covenants*; and one party cannot maintain an action for the default of the other, without averring a performance, or what is equivalent thereto, a tender of performance of the covenants on his part; though it is not certain that either is obliged to do the first act.

This rule applies to every case of a sale of property, where one engages to convey on a certain day and the other to pay at the same time; and this whether the one be stated in terms to be in consideration of the other or not. In neither case will the court compel one party to perform his part until the other has done or has offered to do his own; as where the plaintiff covenanted to sell to the defendant a school-house, &c., and to convey the same to him on or before the 1st of August, 1797, and to deliver up the possession to him on the 24th of June, 1796; and in consideration thereof, the defendant covenanted

<sup>a</sup> Gibbon v. Mendez, 2 B. & A. 17.

<sup>b</sup> Cook v. Jennings, 7 T. R. 381. See *ante*, 115. See also Smith v. Wilson, 8 East, 437. 6 M. & S. 78. Thompson v. Brown, 7 Taunton, 656; (2 Eng. C. L. 247;) overruling Hotham v. The East India Company, Doug. 272. Storer v. Gordon, 3 M. & S. 208. Porter v. Shepherd, 6 T. R. 665. Lock v. Wright, 1 Stra. 569.



to pay the plaintiff 120*l.* on or before the said 1st of August, 1797; held, that the covenant to convey, and that for the payment of the money were dependent or concurrent covenants, and that the plaintiff could not maintain an action for the 120*l.*, without averring that he had conveyed, or tendered a conveyance, to the defendant. The true justice of the case, and the evident meaning of the parties, being that the execution of the conveyance and the payment of the money should be concurrent acts.<sup>a</sup> So where *A.* agreed to convey to *B.* his estate for a certain sum before a particular day, in consideration whereof *B.* covenanted to pay that sum on or before the specified day; and on failure to comply with his covenant he was to pay to *A.* 21*l.*; held to be reciprocal acts, to be performed by the parties at the same time, the one dependent upon the other; \*684 \*and that *A.* could not recover the 21*l.*, without showing a conveyance or a tender thereof on his part.<sup>b</sup> So where *A.* covenanted that he would, on or before a certain day, convey to *B.*, by such conveyance as *B.*'s counsel should advise, all the ground before conveyed to him by *C.*; in consideration of which *B.* covenanted to pay a certain sum, and reserve certain rents, &c., to *A.*, and to lay out a certain sum on the premises: held, that *A.* could not maintain covenant against *B.*, without averring such a conveyance, or a readiness to convey to *B.* on or before the day, all the land, but that *B.* prevented him by some act or neglect of his. And it was not sufficient to maintain covenant to show that after the day *B.* accepted a conveyance of ground rents in lieu of part of the land, and accepted that and the conveyance of the other part in lieu of the conveyance covenanted to be made by *A.*; for this was a substitution of a different agreement by parol, to which the covenant did not apply.<sup>c</sup>

Mutual or independent covenants.

Where mutual covenants go to part only of the consideration on both sides, and where a breach may be paid for in damages, they are termed *mutual or independent covenants*; for a breach of which one party may maintain an action against the other without averring performance on his part; and it is no excuse for the defendant to allege a breach of the covenant on the part of the plaintiff.

Therefore, where *A.* by deed conveyed to *B.* the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of 500*l.*, and an annuity of 160*l.* for life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that *B.* should quietly enjoy; and *B.* covenanted that *A.*, well and truly performing all and every thing therein contained on his part to be performed, he would pay the annuity; in an action by *A.* against *B.* on his covenant, the breach assigned

<sup>a</sup> Glazebrook v. Woodrow, 8 T. R. 374.

<sup>b</sup> Goodison v. Nunn, 4 T. R. 761.

<sup>c</sup> Heard v. Wadham, 1 East, 619.

was the non-payment of the annuity; plea, that *A.* was not at the time of the deed legally possessed of the negroes on the plantation, and so had not a good title to convey: held, on demurrer, \*that the plea was ill. Lord Mansfield, having stated the general principle as above, said, that if such a plea were allowed, any one negro not being the property of *A.* would bar the action.\* “There is a difference,” said Ashhurst, J.,<sup>b</sup> “between executed and executory covenants: here *A.* had conveyed the equity of redemption to *B.*, and so had in part executed his covenant, and it would be unreasonable that *B.* should keep the plantation, and yet refuse payment, because *A.* had not a good title to a few negroes.” \*685

The doctrine laid down in the preceding case has been since frequently acknowledged in terms of the highest commendation.\* It was recognised and acted upon in the following cases.

Where *A.*, in consideration of 250*l.* paid by *B.*, and the further sum of 250*l.* to be paid, &c., covenanted that he would, with all possible expedition, instruct *B.* in a certain mode of bleaching linen, (for which he had obtained a patent,) and *B.* covenanted that he would, on or before the 25th of February, 1794, or sooner, if *A.* should, before that time, have instructed him, &c., pay the further sum of 250*l.*, it was held, that the covenants of *A.* and *B.* were independent covenants, and that *A.* might sue *B.* for the 250*l.*, *without* averring that he had taught *B.* the mode of bleaching linen, &c., for teaching the defendant was not the whole of the consideration of the covenant to pay. The agreement was, that in consideration of 500*l.*, to be divided into two sums, *A.* was to instruct *B.* and let him have the use of his patent; and as *A.*’s agreement had been executed in part by transferring to the defendant a right to use the patent, *B.* ought not to retain that right, paying to *A.* the remainder of the consideration merely, because he might have sustained some damage by *A.*’s not having instructed him. Besides the instruction might, consistently with *A.*’s covenant, as well be given after as before the time specified for the payment of the money.<sup>d</sup>

\*So where the owner of a ship covenanted by charterparty with the freighters to take on board six pipes of brandy at Havre, and proceed therewith to Terceira, where the master was to take on board a full and complete cargo of green fruit, or other goods, as the freighters might think fit to send alongside, and despatch her therewith to London, and the freighters covenanted to pay freight for the fruit at certain terms therein specified, and on the brandy, &c., at a certain rate therein also \*686

<sup>a</sup> Boone v. Eyre, 1 H. Bl. 273. 2 Bl. 1312.

<sup>b</sup> See 6 T. R. 573.

<sup>c</sup> See *verba*, Dallas, C. J., in Fothergill v. Dalton, 8 Taunton, 583. (4 Eng. C. L. 212.)

<sup>d</sup> Campbell v. Jones, 6 T. R. 570. See the observations of the court on this case in Glazebrook v. Widrow, 8 T. R. 370. Duke of St. Albans v. Shore, *ante*, 681.

stipulated; and guaranteed the ship a complete cargo of fruit home; in an action of covenant by the owner against the freighters, for not putting a full cargo of fruit on board at Terceira, he averred a general performance of the covenants contained in the charterparty on his part to be fulfilled: held sufficient, as the covenant by the owner to take the brandy to Terceira was an independent and distinct covenant, and not to be considered as a condition precedent, as it went only to a part of the consideration of the contract.<sup>a</sup> So where plaintiff assigned to defendant a fish business, and also his interest in a salmon fishery, and agreed not to interfere in the business, and defendant agreed to grant plaintiff an annuity, it was held, the covenant not to interfere in the business was an independent covenant.<sup>b</sup>

\*687 Where the plaintiff, as captain of a *South Sea* whaler, covenanted with the defendants that he would proceed to the fishery and procure a cargo of sperm oil, &c., or as great a portion thereof as might be, under all the circumstances, in his power to obtain, and having so done would return to the port of London, and there at his own cost deliver the cargo to the defendants; and also that he would obey such instructions relative to the said vessel and her voyage as might from time to time be received by him from the defendants, and likewise would be as frugal as possible with the stores and provisions of the said ship, and that he would not smuggle or trade, or permit any on board to do so, &c. The defendants covenanted that *on the performance of the before mentioned terms and conditions* on the part of the plaintiff, they would pay him a certain proportion of the proceeds of the cargo. Held, that the plaintiff's covenants \*were independent, and that a strict performance of them was not a condition precedent to his right to recover on the covenants of the defendants. "For," said Tindal, C. J., in delivering the judgment of the court, "the necessary inference from the terms of the covenant is, that it was not the intention of the contracting parties that any of the covenants entered into by the plaintiff should form a condition precedent to his right to recover; if it were, a very small and trifling deficiency from the best possible cargo which it might be in the power of the plaintiff to obtain, if attributable to even the slightest carelessness on his part, or a mere trifling injury, would occasion the total loss of all the profits of the voyage, and of all remuneration to him for long and laborious services; whereas, if the breach of the covenant were made the subject of an action by the defendants, the compensation to them for such a breach would correspond exactly with the extent of their injury. No doubt," added the Chief Justice, "the parties might agree that the remuneration for the plaintiff's services should depend on his strict performance of the covenants which

<sup>a</sup> *Fothergill v. Walton*, 2 Moore, 630. 8 Taunton, 580. (4 Eng. C. L. 212.)

<sup>b</sup> *Carpenter v. Crosswell*, 4 Bing. 409. (15 Eng. C. L. 22.)

he entered into, and if words were used in the contract so precise, express, and strong that such intention only was compatible with the terms employed, the court should give effect to such declared intention of the parties, however inconsistent it might be with general principles of reasoning. If this were *res integra*, the terms of the consideration of the covenant of the defendants, that 'on the performance of the before mentioned terms and conditions on the part of the plaintiff,' &c., might imply an intention, that the performance by the plaintiff was to be a condition precedent; but the cases of *Boone v. Eyre*, 1 H. Bl. 273, and *Hunlocke v. Blacklowe*, 2 Saund. 156, were authorities to show that courts of justice were more anxious to discover and to be governed by the intention of the parties, than to follow the strict and technical form of words used in the instrument. The authorities enabled the court in this case to give effect to that which appeared to them to be the intention of the parties, namely, that the defendants should have a remedy in damages on the covenants entered into by the plaintiff for any loss occasioned by any breach thereof; but that a failure in the full and literal \*performance of these cove-  
nants, on the part of the plaintiff, should not be set up by the defendants as an answer to an action on their covenants.\*

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The following rule has also been laid down as illustrative of an independent covenant:—

If a day be appointed for payment of money or part of it, or for doing any other act, and the day is to happen, or may happen, *before* the thing which is the consideration of the money, or other act is to be performed; an action may be brought for the money, or for not doing the other act before performance, and consequently the declaration need not contain an averment of performance, for the agreement is positive that the money shall be paid on the appointed day, and it is presumed that the party intended to rely on his remedy, and not to make the performance a condition precedent.<sup>b</sup>

As where the plaintiffs covenanted that they should build a house for the defendant, and that it should be furnished by a certain day, and in consideration thereof the defendants covenanted to pay a certain sum by instalments: viz. so much when the second floor should be laid, so much when the third should be laid, and so much when the whole building should be covered in. Buller, J., said that the only question was whether the covenants were dependent, and whether completing the building was a condition precedent. That it was a rule long established in the construction of covenants, that if any money was to be paid before the thing was done, the covenants were mutual and independent; as by the terms of the contract two several sums were to be paid before the thing to be done was

<sup>a</sup> *Stavers v. Curling*, 3 Bing. N. C. 355. (32 Eng. C. L.)

<sup>b</sup> Saund. 320, a. *Thorpe v. Thorpe*, 1 Lord Raym. 665. *Peter v. Opie*, 1 Vent. 177. 2 Saund. 350. 1 Ch. Pl. 328. See *ante*, 114.

done, the plaintiffs were clearly entitled to their action for the money, without averring performance, and the defendant to his remedy on the covenants, if the buildings were not completed at the appointed time.<sup>a</sup> Where there was an agreement by the defendant to give a certain sum to the plaintiff for his lands, and house, &c., to be \*paid at a fixed period, and 5s. of the purchase money was advanced at the time of making the agreement, it was held that the plaintiff might maintain an action on the agreement, without showing that he had either made or tendered a conveyance of the lands: for part of the money was actually paid at the time of the contract, and the residue was made payable on an appointed day, which might happen before the lands were or could be conveyed.<sup>b</sup> So, where the plaintiff agreed to take the defendant into partnership, and also to assign to him a moiety of the interest in the house, to commence *from* and *after* a day named, on condition that the defendant should pay to the plaintiff *on or before* the day specified the sum of 300*l.* It was held, that the covenant of the defendant to pay the money, was precedent to that of the plaintiff to make the conveyance, for the words *from and after* excluded that day.<sup>c</sup> So where premises were demised for a term, at a certain rent, with a proviso for re-entry if the rent should be in arrear twenty-one days; the lessee covenanted to pay the rent, and the landlord covenanted that he, paying the rent at the appointed time, should quietly enjoy, &c.; held, that they were independent covenants, and that the lessee having been disturbed in his possession, might bring covenant against the landlord, though at the time when the cause of action accrued, the rent had been in arrear more than twenty-one days.<sup>d</sup>

Having thus illustrated the nature of dependent concurrent and independent covenants, it remains to add:—1st, That whenever the plaintiff's covenant constitutes a condition precedent, a performance of such condition must be averred, or some excuse<sup>e</sup> for the non-performance must be shown in the declaration, \*and proved at the trial; for if performance or what is equivalent thereto be not alleged, the defendant may plead non-performance of the condition precedent in bar of the action, or take advantage of it on demurrer, or in arrest of judgment, if the omission appear on the record;<sup>f</sup> but after verdict the omission may in some cases be aided by common law intendment, that every thing may be presumed to have been

<sup>a</sup> Terry v. Duntze, 2 H. Bl. 389.

<sup>b</sup> Pordage v. Cole, 1 Saund. 320, b. 1 Lev. 274. Sir T. Raym. 183.

<sup>c</sup> Walker v. Harris, 1 Anstr. 245. Campbell v. Jones, *ante*, 685.

<sup>d</sup> Dawson v. Dyer, 5 B. & Ad. 584. (27 Eng. C. L. 129.)

<sup>e</sup> In averring an excuse for non-performance of a condition precedent, the plaintiff must state his readiness to perform the act, and the particular circumstances which constitute the excuse, as that the defendant either prevented the performance, or rendered it unnecessary by his negligence, or by his discharging the plaintiff from the performance. 2 Saund. 129-132.

<sup>f</sup> Worsley v. Wood, 6 T. & R. 710, *ante*, 120.

proved, which was necessary to sustain the action.<sup>a</sup> 2dly. If the covenants be *concurrent*, and the acts of both parties are to be performed at the same time, the plaintiff must aver a performance, or an offer to perform on his part, or a readiness to perform, and that the defendant had notice thereof.<sup>b</sup> 3dly. If the covenants be independent, performance need not be averred on the part of the plaintiff; and it is no excuse for the defendant that the plaintiff has been guilty of a breach of his covenant.<sup>c</sup>

4.—*Allegation of profert.*] When the deed alleged in the declaration is the foundation of the action, and not stated as an inducement only, the plaintiff must allege that he brings it into court, or as it is technically termed, “make a *profert* of it,” the practical import of which is that the plaintiff has the deed ready to give the defendant a view and copy of it, if he requires it, or, to use the technical phrase, on demand of *oyer*.<sup>(1)</sup> If the deed be in the hands of the opposite party, or if it be lost or destroyed, the plaintiff need not make *profert*, but allege that matter as an excuse. An excuse for the omission of a *profert* is traversable, and therefore should always be according to the fact.<sup>d</sup> If *profert* is made, and *non est factum* be pleaded, the plaintiff will be nonsuited, for he will not be allowed to show at the trial that the deed was lost or destroyed, or in the defendant’s possession; or to give secondary evidence of its contents.<sup>e</sup> When *profert* is alleged, and the plaintiff cannot produce the deed, the proper course for him to pursue is to move to amend the declaration by stating the facts which excuse the omission;<sup>f</sup> such motion should, however, be made before the trial, for it is too late at *Nisi Prius*.<sup>g</sup>

When the plaintiff must make a *profert* of the deed.

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5.—*Averment of breach.*] The allegation of breach must be governed by the nature of the stipulation; it should be assigned in the words of the covenant, either negatively or affirmatively, or in words co-extensive with the import, and effect of it.<sup>h</sup> It is sufficient to assign the breach in the words of the covenant, if in so doing a distinct act of the defendant amounting to a breach be set forth.<sup>i</sup> In covenant by

The breach must be assigned in terms co-extensive with the import

<sup>a</sup> 2 Saund. 352. *Ferry v. Williams*, 8 Taunt. 62, (4 Eng. C. L. 18,) *ante*, 118, 120. *Jones v. Barkley*, Doug. 684. 1 Saund. 228, n. 1.

<sup>b</sup> See *Jones v. Barkley*, *supra*. *Glazebrook v. Woodrow*, 8 T. R. 366, *ante*, 683. *Morton v. Lamb*, 7 T. R. 125. *Levy v. Herbert*, 7 Taunt. 314. (2 Eng. C. L. 119.) And see *Seymour v. Gartside*, 2 D. & R. 55, (16 Eng. C. L. 72,) *ante*, 122.

<sup>c</sup> See *Thomas v. Cadwallader*, *ante*, 682. *Campbell v. Jones*, *ante*, 685.

<sup>d</sup> 1 Saund. 9. See *Pearse v. Morrice*, 3 B. & Ad. 396, *ante*, 675.

<sup>e</sup> *Id.* *Smith v. Woodward*, 4 East, 585. <sup>f</sup> *Id.*

<sup>g</sup> *Paine v. Bustin*, 1 Stark. 74. (2 Eng. C. L. 302.)

<sup>h</sup> Com. Dig. Plead. 6. 1 Ch. Pl. 332. 2 Saund. 181, a. *Falmouth (Earl of) v. Thomas*, 1 C. & M. 89, *ante*, 125.

<sup>i</sup> *Warn v. Bickford*, 7 Price, 550.

(1) (*Smith v. Emery*, 7 Halsted, 53.)



of the covenant.

an apprentice for not finding victuals and other necessities, a breach in the words of the covenant is sufficient.<sup>a</sup> Where the covenant is that the grantee shall quietly enjoy without the interruption of the covenantor, his heirs or executors, it is sufficient to allege as a breach, that he, or his heirs or executors entered without showing it to be a lawful entry.<sup>b</sup> But some act must be shown by which the plaintiff was interrupted for otherwise the breach will not be well assigned.<sup>c</sup> But in a covenant for quiet enjoyment, without interruption by the grantee or any person lawfully claiming under him, the breach should show that the party who evicted the plaintiff had a lawful title, and was therefore not a trespasser; it is however sufficient to state, that the evictor lawfully claiming title under the grantee entered, without setting forth the particulars of his title.<sup>d</sup> In covenant not to use rooms in a certain way, a new breach is committed every day the rooms  
 \*692 \*are so used; and a waiver of the forfeiture does not prevent the lessor from taking advantage of a subsequent breach.<sup>e</sup> If a lessor covenant for quiet enjoyment against the lawful let, suit, entry, &c., of himself, his heirs and assigns, the declaration for a breach of the covenant need not expressly allege that he entered, "claiming title," if the disturbance complained of be such as clearly appears to be an assertion of right.<sup>f</sup>

In assigning a breach of covenant which was for quiet enjoyment, it is sufficient to allege that at the time of the demise to the plaintiff, *A. B.* had lawful right and title to the premises, and having such lawful right and title, entered, &c., and evicted him, &c., without showing what title *A. B.* had, or that he evicted the plaintiff by legal process, &c.<sup>g</sup> In an action for a breach of covenant on the defendant's demise, for not having a good title to demise for the whole of the term demised, whereby the plaintiff's assignee of the lease was evicted, and the plaintiff put to costs in an action against him by such assignee, for such eviction; the plaintiff must show who evicted the assignee, and merely stating that a third person was seised in fee of the premises, and that the assignee was evicted generally, is not sufficient.<sup>h</sup> A declaration in an action for quiet enjoyment having set out an indenture from *A.* to *B.*, in which it was recited that *J. S.* demised the premises to *A.* by indenture, and it was afterwards stated that *J. S.* had entered and ejected *C.* from the premises for a forfeiture; held, that the court might, after

<sup>a</sup> 3 Lev. 170.

<sup>b</sup> 1 Saund. 181, *a.*

<sup>c</sup> *Id.*

<sup>d</sup> *Hodgson v. The East India Company*, 8 T. R. 278. 2 Saund. 181.

<sup>e</sup> *Doe d. Ambler v. Woodbridge*, 9 B. & C. 377. (17 Eng. C. L. 399.) S. P. *Doe v. Johnson*, 1 Stark. 411. (3 Eng. C. L. 448.) *Doe d. Flower v. Peck*, 1 B. & Ad. 428. (20 Eng. C. L. 417.)

<sup>f</sup> *Lloyd v. Tompkins*, 1 T. R. 671.

<sup>g</sup> *Foster v. Pierson*, 4 T. R. 617.

<sup>h</sup> *Fraser v. Skey*, 2 Chitty, 646. (18 Eng. C. L. 441.)

verdict, presume that *J. S.* had a title to the premises, although there was no express allegation of that fact; and although part of the special damage laid in the declaration did not fall strictly within the covenant alleged to be broken; it must be presumed after verdict, that the jury were directed at the trial not to take that part into their consideration.<sup>a</sup>

\*In an action of covenant "that the grantor has good right and lawful authority to grant," the breach may be as general as the covenant, following the words thereof in the negative, as it lies more properly in the knowledge of the lessor, what estate he had in the land which he demised, than in the lessee who was a stranger to it.<sup>b</sup>

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Assign-  
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breaches.

The plaintiff should be careful not to qualify the negative words of his breach by adding affirmatively other matters of breach. In covenant to allow a business to be carried on in a certain shop, a breach that defendant improperly shut up the shop is sufficient, without alleging that the shop was shut up at unreasonable or improper times.<sup>c</sup> If the breach of a covenant be assigned thus, "that the defendant had not used a farm in a husbandlike manner, but on the contrary, had committed waste," the plaintiff cannot give evidence of the defendant's using the farm in an unhusbandlike manner, if it do not amount to waste.<sup>d</sup> In assigning the breach of a covenant not to release a debt, or not to assign without license, it must be averred that the release or alienation was without license, though the burden of proof of license would still be affirmatively on the defendant.<sup>e</sup> If the covenant be in the disjunctive, the breach ought to state that the defendant did not do one act or the other. But where the covenant was to "pay or *cause to be paid* a sum of money," it was held sufficient in assigning the breach, to state that the defendant did not pay, omitting the words "or cause to be paid," for he who causes to pay, pays.<sup>f</sup> So where there are several plaintiffs, a breach that the defendant did not pay them is sufficient, without saying "either of them," and if there be several defendants, an averment that they have not paid is sufficient, for payment by one is payment by all.<sup>g</sup> When a profer or an excuse for the omission is unnecessary, an allegation making the profer, will be considered as surplusage, and will not entitle the other party to over.<sup>h</sup> The omission of profer when necessary can only be taken advantage of by special demurrer.<sup>i</sup>

Covenant  
in the dis-  
junctive.

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Though a breach may be assigned in the words of the co-

<sup>a</sup> *Campbell v. Lewis*, (in Error,) 3 B. & A. 392. (5 Eng. C. L. 322.) S. C. *Lewis v. Campbell*, 3 Moore, 35.

<sup>b</sup> 2 Saund. 181, a. *Bradshaw's case*, 9 Co. 60.

<sup>c</sup> *Hodges v. Gray*, 4 Dowl. P. C. 733.

<sup>d</sup> *Harris v. Mantle*, 3 T. R. 307.

<sup>e</sup> Vin. Ab. Cov. L. a. 63. 1 Ch. Pl. 336.

<sup>f</sup> *Aleberry v. Walby*, Stra. 231. 1 Saund. 234, c.

<sup>g</sup> *Id.* 5th Ed.

<sup>h</sup> *Morris's case*, 2 Salk. 497.

<sup>i</sup> 4 & 5 Ann. c. 76. Com. Dig. Pleader, S. 17.

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venant, it must not be too general, it must show the subject matter of the complaint; an assignment of a breach in the words of the covenant was held ill upon a demurrer to the defendant's plea, because the assignment did not show any particular act or any omission by the defendant which amounted to a breach of his covenant.<sup>a</sup> So, where *A.* and *B.* were lessees of a coal-mine, *A.* being also lessee in trust for himself, and *B.* of land adjoining, for the working of the mine, covenanted with *C.* that he would do nothing whereby an annuity charged upon the profit which might be made under the leases of the mine and land might be *impeached*. In an action on the covenant *C.* assigned as breaches, 1st, that *A.* surrendered the land and took a new lease to himself and *B.* jointly in trust for other persons, whereby the annuity became and was impeached, and the plaintiff lost his remedies to enforce it; 2dly, that *A.* and *B.* accepted a new lease of the land, at an increased rent, and in other respects upon less advantageous terms, for the fraudulent purpose of obtaining from the lessor a demise of mines under the land upon terms advantageous to *A.* and *B.*, whereby the annuity became and was impeached; 3dly, that *A.* and *B.* assigned (amongst other things) such neighboring mine and the land to *D.*, whereby the annuity became and was impeached:—held, that the declaration was insufficient for not showing in what manner the acts complained of operated to impeach the annuity.<sup>b</sup>

If, however, the covenant be to do or forbear a specific act, it will be sufficient to assign the breach in the words of the contract, as in covenant for revoking an arbitrator's authority, it is sufficient to aver that the defendant by deed *revoked*, without saying that he gave notice of the revocation to the arbitrator, \*for without such notice there could be no revocation, consequently the allegation imported notice.<sup>c</sup>

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As to the consequences of the omission or insufficiency of a breach, see *ante*.<sup>d</sup> However informally a breach of covenant may be assigned in the declaration, yet after judgment by default, the court will decide in accordance with the justice of the case notwithstanding the informality.<sup>e</sup>

<sup>a</sup> *Warn v. Bickford*, 7 Price, 550.

<sup>b</sup> *Pitt v. Williams*, 4 Nev. & M. 412. 2 Adol. & Ellis, 419. (29 Eng. C. L. 128.)

<sup>c</sup> *Vignior's case*, 8 Co. 162. *Marsh v. Bulteel*, 5 B. & A. 507. (7 Eng. C. L. 175.) 1 Ch. Pl. 333. Where the author puts a *quære*.

<sup>d</sup> 125.

<sup>e</sup> *Brookes v. Heberd*, 8 D. & R. 69.

## SECTION XX.

## THE PLEADINGS.

IN an action of covenant there is no general issue. Even before the new rules the plea of *non est factum* only put in issue the due execution of the deed. Since the new rules, "In deed on specialty or covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void as well as those which make it voidable."<sup>a</sup>

The plea of *non infregit conventionem* is bad on demurrer, but it would be good after verdict.<sup>b</sup> *Riens en arrière*, is also a bad plea, because it impliedly admits that although nothing is *now* due, yet that the money was not paid on the appointed day.<sup>c</sup> Where in covenant upon a lease the breach alleged was that during the term, to wit, on the 25th of March, two quarters' rent became due; a plea "that no quarters' rent ending the 25th of March then became due according to the provisions of the indenture, in manner and form, &c.," was held ill. "The substantial allegation," said Tindal, C. J., "is, that the rent became due during the term, and though a particular day is specified, that carries it no farther; then, according to the old authorities *riens in arrière* is no plea to a covenant for payment of rent on a particular day."<sup>d</sup>

In this action, therefore, the defendant must specially deny that the deed declared upon was executed by him, or show a performance or a legal excuse for the non-performance of his covenant; or admitting the breach, that he was discharged by matter *ex post facto*. Under *non est factum* it is incumbent on the plaintiff to show that the defendant has executed the deed as stated in the declaration; and the defendant may, at the trial, take advantage of any alteration or erasure, for if any alteration has been made it is not the same deed which the defendant executed, and, therefore he is not liable on it.<sup>e</sup> The defendant may also under this plea, avail himself of a *variance* in setting out the deed in the declaration,<sup>f</sup> unless he craves *oyer*

<sup>a</sup> R. G. H. T. 4 W. IV.

<sup>b</sup> Hodgson v. The East India Company, 8 T. R. 278. Bone v. Eyre, 2 Bl. 1312. Taylor v. Needham, 3 Taunt. 278. Com. Dig. Pleader, (2 V.) Pitt v. Russell, 3 Lev. 19.

<sup>c</sup> Hare v. Saville, 1 Brownlow, 19. Cowp. 589. It seems, however, that it would be a good plea in debt for rent. Warner v. Theobald, Cowp. 588. Where there is a covenant in a lease to allow so much of the rent as may be necessary to be expended in repairing the premises, evidence of repairs and money expended thereon will support the plea of *riens in arrière* to an avowry. Woods v. Rock. 1 Alcock & Nap. 57.

<sup>d</sup> Baden v. Flight, 3 Bing. N. C. 685. (32 Eng. C. L.)

<sup>e</sup> Cock v. Coxwell, 1 Gale, 177. 2 C. M. & R. 291.

<sup>f</sup> Pitt v. Green, 9 East, 188. As to variances, see *ante*, 676, et seq.

and sets it out; for by that the variance would be aided, because the deed set out becomes part of the declaration, and the only question then would be whether the deed set out was executed by the defendant.<sup>a</sup>

*Nil habuit  
in tenementis.*

\*697 It is a general rule that a tenant shall not be permitted to controvert the title of his landlord to the premises which he holds under him. Therefore, in an action of covenant on the indenture the lessee cannot plead generally that the lessor had no interest in the demised premises;<sup>b</sup> nor that the lessor had only an equitable estate in the premises; for that is tantamount to a plea of *nil habuit in tenementis*.<sup>c</sup> But if the plaintiff claim as heir, devisee, or assignee of the lessor, the lessee may traverse the *derivative title* of the plaintiff; or admitting that the lessor had some legal estate in the premises at the time of the demise, \*he may plead that it was a different estate from that set out in the declaration, and thereby show that the plaintiff has not the title which he claims. As where a covenant was brought on a lease for years by the plaintiff as heir in reversion in fee to his father, and the defendant pleaded that the father, when he made the lease, was only tenant for life, and the father being dead the lease determined, and traversed, that the reversion belonged to the father in fee; on demurrer, the plea was held good, and the court said, that the defendant might either traverse that the father was seised of the reversion in fee, or that it descended to the plaintiff.<sup>d</sup> So, where in covenant for non-payment of rent, on an indenture by the assignee of the lessor against lessee, the declaration alleged that the lessor was possessed for the remainder of a term of twenty-two years, commencing from the 25th of December, 1797, and that on the 7th of March, 1811, he, by indenture, demised to the defendant to hold from the 20th of December then last past. Plea, that the lessor was not at the time of making the indenture possessed for the residue of the said term *modo et forma*. Held, that such plea was good on general demurrer, for the defendant did not deny the title of the lessor to grant the term which he possessed, but the plaintiff's title only. The allegation of possession by the lessor for twenty years was made by the assignee, not the lessor; and the defendant had a right to know whether there was a privity between him and the assignee, by means of a conveyance by the lessor of a true title.<sup>e</sup> In a subsequent case, Bayley, J., recognised the above decision, observing, that when a lessee was sued by the assignee of

<sup>a</sup> Snell v. Snell, 4 B. & C. 741. (10 Eng. C. L. 453.) Swallow v. Beaumont, 2 B. & A. 765.

<sup>b</sup> 2 Saund. 418. Palmer v. Fkins, 2 Stra. 818. 2 Lord Raym. 1550. Parker v. Manning, 7 T. R. 537. See Hodgson v. Sharpe, 10 East, 350. Taylor v. Needham, 2 Taunton, 278.

<sup>c</sup> Blake v. Foster, 8 T. R. 487.

<sup>d</sup> Brudnell v. Roberts, 2 Wils. 143. 2 Saund. 418.

<sup>e</sup> Carvick v. Blagrove, 4 Moore, 303. S. C. 1 B. & B. 531. (5 Eng. C. L. 178.)

the lessor, the defendant was at liberty to say that the lessor had not such an interest as could pass to the assignee.<sup>a</sup>

A general plea of performance is good where the covenants sued upon are in the affirmative. Performance must be pleaded in the words of the covenant, for if pleaded otherwise it is bad even on general demurrer.<sup>b</sup> But a general averment of performance, "according to the provisions of the said agreement," is sufficient on general demurrer, although the agreement contains conditions precedent, and a specific averment of performance would have been indispensable on special demurrer.<sup>c</sup> If, however, any of the covenants be in the negative, the defendant must plead specially, for a negative cannot be performed;<sup>d</sup> and if any of them be in the disjunctive he must show which of them he has performed.<sup>e</sup> Where the covenant is for the act of a stranger, performance generally is not a good plea, the defendant must show how performed.<sup>f</sup>(1)

In a covenant for nonpayment of rent, entry and eviction is a good plea; for the lessee has a right to show that he does not enjoy that which was the consideration for his covenant; if, therefore, he has been evicted he cannot be compelled to pay the rent; eviction is a suspension of the rent, but the plea must state an eviction or expulsion of the lessee out of all or some part of the demised premises and keeping him out of possession until after the rent became due;<sup>g</sup> a mere trespass will not suffice.<sup>h</sup> The entry and eviction must be specially pleaded, and where an eviction by a stranger is pleaded, the lessee must show that such stranger had a right to evict him, and set out his title.<sup>i</sup>

A release, we have seen, is a discharge of the covenant.<sup>j</sup>

<sup>a</sup> *Seymour v. Frances*, K. B. M. T. 1828. Law Journal, vol. 7, p. 18. 1 Ch. Pl. 487. In 1762, a lessor having only an equitable estate in a certain field, demised a portion of the field to a lessee for ninety-nine years. In 1773, the lessor having acquired the legal estate in the field, demised the residue of the field to the lessee for the same term, by an indenture, which recited the former lease, stipulated for its continuing in force, but provided that no more rent should be paid for the entire field than was paid for the first portion, and that the rent to be paid for the entire field was meant to be the same as that reserved for the first portion. Held, that the assignee of the reversion could not sue the assignee of the lessee upon the covenants in the lease of 1762. *Whitton v. Peacock*, 2 Bing. N. C. 411. (29 Eng. C. L. 375.) 1 Hodges, 376. See S. C. 3 Mylne & K. 325, *ante*, 658.

<sup>b</sup> *Scudamore v. Stratton*, 1 Bos. & P. 455. It is no defence at law to an action on an indenture of lease by the trustee of a party who has become bankrupt, that the defendants, the lessees, have performed their covenants with the assignees of the *cestui que trust*. *Britten v. Britten, or Perrott*, 2 C. & M. 597. 4 Tyr. 473.

<sup>c</sup> *Varley v. Manton*, 9 Bing. 363. (23 Eng. C. L. 307.)

<sup>d</sup> *Cropwell v. Peachy*, Cro. Eliz. 691.

<sup>e</sup> Co. Litt. 303, *b*.

<sup>f</sup> B. N. P. 166.

<sup>g</sup> Co. Litt. 148, *b*. *Dorrel v. Andrews*, Hob. 190. *Timbrell v. Bullock*, Sty. 446. 1 Saund. 204. *Hodgskin v. Queensborough*, Willes, 129.

<sup>h</sup> *Id.* *Hunt v. Cope*, Cowp. 442. Nor will an illegal ouster by the lessor. *Vouchell v. Dancastell*, Moor, 891. 1 Saund. 204, 5th Ed.

<sup>i</sup> *Jordan v. Twells*, Cas. Temp. Hard. 171. 1 Saund. 204.

<sup>j</sup> *Ante*, 652.

(1) (See *Finney v. Boehme*, 3 Gill & Johna. 42.)



formerly it might be given in evidence under the general issue but since the new rules it must be specially pleaded, being matter in confession and avoidance.

Accord and satisfaction.

Accord and satisfaction is a good plea where there has been a breach of the covenant, but not before breach; for a deed cannot be discharged except by matter of as high nature; accord and satisfaction, therefore, cannot discharge the covenant, but it goes in discharge of the damages, a right to which does not accrue, until there be a breach of the covenant. In every action where compensation is demanded by way of damages only, accord and satisfaction is a good bar.<sup>a</sup>

A plea of an accord which is executory only, and not executed before action brought, is not sufficient in an action on a covenant.

Where in an action of covenant for neglecting to repair, the defendant pleaded, that after the covenant had been broken, an agreement was entered into between the plaintiff and the defendant, that in consideration that the defendant, at the request of the plaintiff had become tenant of the premises from year to year at a certain rent, and had, at the request of the plaintiff, promised to repair the premises before the 12th of April, then next, the plaintiff would give time till the 12th of April for such repairs, without bringing an action, and in case the premises should be repaired by the 12th of April, would relinquish all claims in respect of the breach of covenant, with an averment that though the defendant was ready to perform the agreement, the plaintiff brought the action before the 12th of April; held ill, on motion in arrest of judgment; *first*, because it was a plea of an accord, which was executory only, and not executed; and a plea of accord, to be good, must show an accord which ought to be executed, and has been executed before action brought; and *secondly*, because it did not show a good consideration for the defendant's promise to repair before the 12th of April, or for the plaintiff's promise to forbear to sue until that day; for the defendant was liable to damages for a breach of the covenant, before he made the promise to repair before the 12th of April, consequently such promise could be no consideration for the plaintiff's promise to forbear; and as such promise to repair was not made until after the new tenancy was contracted, the tenancy was no consideration for the subsequent promise.<sup>b</sup>

Tender.

Upon a bare covenant for the payment of money, the defendant may plead a tender. Therefore where an action of debt was commenced against the defendant for the non-payment of rent, and discontinued, and an action of covenant was then brought for the same rent, which the defendant tendered previously to its commencement; held, that such tender might be pleaded.<sup>c</sup> So in covenant on insurance against fire, a tender may be pleaded, and money paid into court under 19 Geo. II, c. 37, s. 7.<sup>d</sup>

<sup>a</sup> Alden v. Blague, Cro. Jac. 99. Kaye v. Waghorn, 1 Taunt. 428. See *ante*, 132.

<sup>b</sup> Bayley v. Homan, 3 Bing. N. C. 915. (32 Eng. C. L.)

<sup>c</sup> Johnson v. Clay, 1 Moore, 200. 7 Taunton, 486. (2 Eng. C. L. 181.)

<sup>d</sup> Solomon v. Berwick, 2 Taunton, 317. See *ante*, 132, et seq.

A set off is allowed in an action of covenant for non-payment of money as for rent. By the new rules, set off must be specially pleaded; but even before the new rules, it was necessary to plead it specially in an action on specialty, because there was no general issue in such action.<sup>a</sup> But the defendant cannot set off unliquidated damages arising from other covenants to be performed by the plaintiff;<sup>b</sup> nor will a plea of set off be sustained in an action for unliquidated damages as in covenant for not indemnifying the plaintiff against taxes.<sup>c</sup> Set off. \*700

Where in covenant against an assignee of a lease the plaintiff declared that all the right, &c., vested in the defendant by assignment, and that afterwards the premises were out of repair and defendant pleaded in bar that for one period he was possessed of one sixth of the premises as tenant in common with *A.*, *B.* and *C.*, and for another period of one-third as tenant in common with *B.* and *C.*, and that no more or greater interest in the premises ever came to him by assignment; held, that the plea was bad in substance, as it could not be a bar to the whole action; that it was bad in form also, as it merely confessed that defendant had possession of part of the premises, and not that he was assignee. The defendant should have pleaded in abatement, and should have shown how the other persons became tenants in common with him.<sup>d</sup> In covenant for seven quarters' rent, a plea showing a surrender before the last four of the seven quarters' rent accrued, is bad on demurrer, because it does not go to the whole breach, and the breach is not entire, but part of it may be proved.<sup>e</sup> A covenant by lessor, that lessee paying the rent and performing covenants shall quietly enjoy, is not a conditional covenant; and a plea stating the non-payment of the rent, or the non-performance of a covenant by the lessee (to insure,) is no bar to an action by the lessee on the covenant for quiet enjoyment.<sup>f</sup> A plea is bad which is not a bar to the whole action.

Formerly, payment of money into court was not permitted when the damages were unliquidated and the breach was not for a money demand, as in an action for dilapidations;<sup>g</sup> but by a recent statute money may in all cases of covenant be brought into court;<sup>h</sup> such payment admits the execution of the deed;<sup>i</sup> and if two breaches be assigned in one count, and the defendant pay money into court upon one of them, it admits the whole contract as set out in the count, so as to enable the Payment of money into court.

<sup>a</sup> B. N. P. 180. *Oldenshaw v. Thompson*, 5 M. & S. 164. 1 Stark. 311. (2 Eng. C. L. 404.) See *ante*, 161.

<sup>b</sup> *Howlett v. Strickland*, Cowp. 56. *Weigal v. Waters*, 6 T. R. 488.

<sup>c</sup> *Cooper v. Robinson*, 2 Chitty, 161. (18 Eng. C. L. 284.)

<sup>d</sup> *Merceron v. Dowson*, 5 B. & C. 479. (11 Eng. C. L. 277.)

<sup>e</sup> *Barnard v. Duthy*, 5 Taunt. 27. (1 Eng. C. L. 7.)

<sup>f</sup> *Dawson v. Dyer*, 2 Nev. & M. 559. 5 B. & Ad. 584. (27 Eng. C. L. 129.)

<sup>g</sup> *Salt v. Salt*, 8 T. R. 47.

<sup>h</sup> 3 & 4 W. IV, c. 42, s. 21, *ante*, 152.

<sup>i</sup> *Dyer v. Ashton*, 1 B. & C. 3. (8 Eng. C. L. 4.)

\*plaintiff to recover on the second breach without proof of the contract.<sup>a</sup>

## SECTION XXI.

### EVIDENCE.

A deed thirty years old proves itself.

When a deed produced by the adverse party need not be proved.

WE have seen that *non est factum* puts in issue the execution of the deed which is done by proving the sealing and delivery thereof by the testimony of the attesting witnesses. If, however, the deed when produced, appear to be *thirty years* old, no further proof is requisite; for it is a peremptory rule of law, founded upon general convenience, that after a lapse of thirty years, proof of the execution of a deed shall be unnecessary.<sup>b</sup> Some account, however, ought to be given of the place where it has been kept, for it is essential to show it has been brought from the natural and legitimate repository.<sup>c</sup>

It was formerly held that the production of a deed by the adverse party, in compliance with a notice for that purpose superseded the necessity of proving the execution of it.<sup>d</sup> But it is now settled that the execution of the instrument must be proved in the usual way, even though it be produced by the adverse party.<sup>e</sup> It has, however, been decided that where a party at a trial produces upon notice a deed under which he claims a beneficial interest, it is not necessary for the adverse party to prove the execution of it.<sup>f</sup> And the court came to a similar decision in a case where both parties claimed an interest in the instrument so produced.<sup>g</sup> But where a party produced, at the trial of a cause, a deed which had been some months in his possession, the court held that it could not be received in evidence without the ordinary proof  
 \*702 \*of the execution, though he had received it from the adverse party who had formerly claimed a benefit under it. "I am not aware," said Bayley, J., "that evidence of a subscribing witness to a deed has ever been dispensed with on the ground of its coming from an adverse party, except where the instrument was produced by such party *at the trial*."<sup>h</sup>

<sup>a</sup> *Id.*

<sup>b</sup> B. N. P. 255. 1 Stark. Ev. 331. Bac. Ab. Ev. F. 647.

<sup>c</sup> *Id.* And if there be any blemish or erasure on the face of it, the party producing it should show how it arose. B. N. P. 225. *Henman v. Dickenson*, 5 Bing. 183, (15 Eng. C. L. 409,) *ante*, 393.

<sup>d</sup> *R. v. Middlezoy*, 2 T. R. 41. 1 Esp. 109.

<sup>e</sup> *Gordon v. Secretan*, 8 East, 548.

<sup>f</sup> *Pearce v. Hooper*, 3 Taunt. 69. See *Doe d. Tyndale v. Heming*, 6 B. & C. 28. (13 Eng. C. L. 99.) 9 D. & R. 15.

<sup>g</sup> *Knight v. Martin*, Gow. 26. (5 Eng. C. L. 446.) Dallas.

<sup>h</sup> *Vacher v. Cocks*, 1 B. & Ad. 145. (20 Eng. C. L. 364.)

When proof of the execution of a deed is necessary, and the sealing and delivery be proved, the signing is not essential. It is immaterial with what seal it is sealed; one piece of wax will suffice for several obligors.<sup>a</sup> No particular form or ceremony is essential to a delivery; it is sufficient if the party by any act indicates an intention to put the deed into the possession of the other party as by throwing it down on the table for the other to take it up. So, if a stranger deliver it with the assent of the party to the deed.<sup>b</sup>

If the deed be made by a corporate body, it is sufficient to prove that it was sealed by the corporate or any other seal which was used for the occasion, without proving a delivery of the deed.<sup>c</sup> Where a deed is executed by power of attorney from the obligor, the power of attorney must be proved;<sup>d</sup> proof of the delivery of a sealed instrument will be evidence that the party acknowledges the seal to be his.<sup>e</sup> If the deed was attested and the witnesses are forthcoming, it must be proved by one at least of the attesting witnesses; but if any suspicion be attached to the execution, it is prudent to call all the witnesses.<sup>f</sup> The party who calls an attesting witness is not concluded by his evidence if he refuses to tell the truth; or if he does not prove the due execution of the instrument the attestation may be proved by another witness.<sup>g</sup>

In addition to proof of the execution of the deed, some evidence of the identity of the party executing it must be given. Where the witness stated that he saw the instrument executed by a person who was introduced under the name of Hawkshaw (the name of the defendant,) but could not identify him with the defendant, the plaintiff was nonsuited.<sup>h</sup>

If an attesting witness can be produced, and there be no objection to his competency, his evidence cannot be dispensed with, not even by proof of an acknowledgment of the execution by the party himself, nor by proof of an admission of the execution made by him in his answer to a bill in equity.<sup>i</sup> But if, on the other hand, it be proved that the attesting witnesses

Execution consists in sealing and delivering.

Corporate seal.

When the execution must be proved by an attesting witness.

Proof of identity.  
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When the evidence

<sup>a</sup> Shep. Touch. 55. Ball v. Dunsterville, 4 T. R. 315. A covenant is valid and binding although indorsed on the deed after signing, before the sealing and delivery. Lyburn v. Wamington, 1 Stark. 163. (2 Eng. C. L. 338.) Ellenborough.

<sup>b</sup> 1 Stark. Ev. 322. Co. Litt. 36, a. Murray v. The Earl of Stair, 2 B. & C. 82. (9 Eng. C. L. 33.)

<sup>c</sup> Perk. C. 2. 1 Stark. Ev. 323.

<sup>d</sup> Id.

<sup>e</sup> Id.

<sup>f</sup> B. N. P. 264. 1 Stark. Ev. 223.

<sup>g</sup> R. v. Harrington, 4 M. & S. 353. Talbot v. Hodgson, 7 Taunt. 251. (2 Eng. C. L. 291.) Per Lord Mansfield, 4 Burr. 2224.

<sup>h</sup> Parkins v. Hawkshaw, 2 Stark. 239. (3 Eng. C. L. 332.) Middleton v. Sandiford, 4 Camp. 34. Whitelock v. Musgrove, 1 C. & M. 511. See Parke v. Mears, 2 B. & P. 217. Powell v. Blackett, 1 Esp. 97.

<sup>i</sup> Doe v. Durnford, 2 M. & S. 62. Abbott v. Plumbe, Dong. 205. Johnson v. Mason, 1 Esp. 89. Jones v. Brewer, 4 Taunt. 56. Honeywood v. Peacock, 3 Camp. 196. But payment of money into court on one of the breaches of covenant assigned, amounts to an admission of the deed, although non est factum has been pleaded. Randall v. Lynch, 2 Camp. 357.

of the at-  
testing  
witness  
will be  
dispensed  
with.

are dead, blind or insane, or have become infamous or interested subsequent to the execution of the deed, or that they are absent in a foreign country and out of the jurisdiction of the court, either for a permanent residence or a temporary purpose, or that from circumstances it may be fairly presumed that they have left the country, or that upon inquiry at the admiralty it appears that they are serving in the navy, or that they cannot be found after strict and diligent inquiry, or that they have been kept out of the way at the instance of the adverse party; then, after proof of any of these circumstances, the execution of the deed may be proved by evidence of the hand-writing of the witness;<sup>a</sup> and if there be more than one attesting witness, evidence of the signature of one is sufficient, if none of them can be produced.<sup>b</sup>

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It has been decided that proof of the hand-writing of a subscribing witness, where there is a sufficient excuse for his absence, is of itself sufficient without proof of the signature of the obligor, or without any evidence of his identity.<sup>c</sup> But the contrary has been held in a recent case, and it is now settled that proof of the signature of the attesting witness is not sufficient without evidence of the identity of the party sued with the party who appears to have executed the instrument.<sup>d</sup>

When the  
deed has  
been lost  
or destroyed,  
the  
contents  
may be  
proved by  
secondary  
evidence.

If the deed has been lost or destroyed, or if after diligent inquiry it cannot be found, secondary evidence of its contents will be admissible on proof of these facts; but if two or more parts of the deed have been executed, the destruction or loss of all must be proved before secondary evidence of its contents can be received.<sup>e</sup> But it must be shown that the deed was properly stamped, and that it had existed as a complete genuine instrument; for the consciousness of some fatal defect being in it may have been the motive for concealing or destroying it.<sup>f</sup> So, if the deed be in the possession of the adverse party, and it be not forthcoming at the trial, secondary evidence of its contents will be admitted after proof of notice to him or his attorney to produce it.<sup>g</sup> Against a party who refuses (after

<sup>a</sup> See 1 Stark. Ev. 325, et seq., where all the cases on this subject are collected. Where an attesting witness could not be found after sufficient inquiry, evidence of his handwriting was admitted, though a letter not disclosing his retreat had been received from him a few days before the trial. *Morgan v. Morgan*, 9 Bing. 359. (23 Eng. C. L. 306.) See *Miller v. Miller*, 2 Bing. N. C. 76. (29 Eng. C. L. 260.) 1 Hod. 87.

<sup>b</sup> *Adams v. Kerr*, 1 B. & P. 360. *Prince v. Blackburne*, 2 East, 250.

<sup>c</sup> *Kay v. Brookman*, M. & M. 286. 3 C. & P. 555. (14 Eng. C. L. 446.) Best. *Mitchell v. Johnson*, *id.* 176. (22 Eng. C. L. 283.) Tenterden. *Page v. Mann*, *id.* 79. (22 Eng. C. L. 256.) Tenterden.

<sup>d</sup> *Whitlocke v. Musgrove*, 1 C. & M. 511. See *Nelson v. Whittall*, 1 B. & A. 21.

<sup>e</sup> *R. v. East, Farleigh*, 6 D. & R. 146. (16 Eng. C. L. 258.) B. N. P. 254. *R. v. Castleton*, 6 T. R. 236.

<sup>f</sup> See *Goodier v. Lake*, 1 Atk. 246. *Butler v. Allnutt*, 1 Stark. 222. (2 Eng. C. L. 365.) *Munn v. Godbold*, 3 Bing. 292. (11 Eng. C. L. 103.) 1 Stark. Ev. 340. *R. v. Piddlehinton*, 3 B. & Ad. 460. (23 Eng. C. L. 121.) *R. v. Stourbridge*, 8 B. & C. 96. (15 Eng. C. L. 155.) *Rippiner v. Wright*, 2 B. & A. 478.

<sup>g</sup> 1 Stark. Ev. 347, et seq. And the subscribing witness need not be called. *Cooke v. Tansell*, 8 Taunton, 450. (4 Eng. C. L. 163.)

notice) to produce an agreement, it will be presumed that it is stamped.<sup>a</sup> An instrument which has been traced to the hands of an opposite party cannot be presumed to have been lost or destroyed, unless such party has had notice to produce it.<sup>b</sup>

The breach must be proved as alleged in the declaration; the nature of the evidence, therefore, must depend on the terms of the covenant, consequently each case must be governed by its own peculiar circumstances. Proof of breach.

\*Where an expression used in a written instrument has a technical meaning, parol evidence is admissible to show that it had been used in that sense, and not in its ordinary meaning in common parlance, although that may be perfectly clear and unambiguous in itself; therefore, where the lessee of a coal-mine covenanted to get the whole of the mines "not deeper than or below the level of the bottom of the mine at a particular point," held, that parol evidence of the understanding amongst miners was admissible to show that the word "level" had a particular technical meaning, different from its ordinary signification of "horizontal line."<sup>c</sup> So, where in a lease *inter alia* of a rabbit warren the lessee covenanted that at the expiration of the term he would leave on the warren ten thousand rabbits; it was held, that parol evidence was admissible to show that by the custom of the county where the lease was made, the word "thousands" as applied to rabbits, denoted twelve hundred.<sup>d</sup> \*705  
Parol evidence to explain.

## SECTION XXII.

### THE JUDGMENT.

THE judgment in an action of covenant is, that the plaintiff recover a named sum for the damages which he has actually sustained by reason of the breach or breaches, together with full costs, to which he is entitled, though the damages recovered be under forty shillings, unless the judge certify under 43 Eliz. c. 6.<sup>e</sup> If the defendant has judgment against him upon *nil dicit*, confession, or demurrer, a writ of inquiry shall be awarded to inquire of the damages.<sup>f</sup> Where a breach was

<sup>a</sup> Crisp v. Anderson, 1 Stark. 35. (2 Eng. C. L. 283.) Ellenborough.

<sup>b</sup> Doe d. Phillips v. Morris, 3 Ad. & Ell. 46. (30 Eng. C. L. 22.) 4 N. & M. 598. 1 H. & W. 226.

<sup>c</sup> Clayton v. Greyson, 4 Nev. & M. 602. (30 Eng. C. L. 400.) 1 Har. & Woll. 159.

<sup>d</sup> Smith v. Wilson, 3 B. & Ad. 728. (23 Eng. C. L. 169.)

<sup>e</sup> Tidd, 9th ed. 252, et seq.

<sup>f</sup> S. N. P. 524. Where a deed contains covenants for the performance of several things, and one large sum is stated at the end to be paid upon breach of performance,



\*assigned on two covenants, one of which was bad, and a verdict was given for the plaintiff on both, and entire damages assigned, judgment was arrested.<sup>a</sup> In covenant for non-payment of rent at divers days, which amounted to so much, and in the declaration the sum was mis-cast, it was held not to be error, and that the plaintiff might have a verdict for so much as was really in arrear.<sup>b</sup> If in an action against two there be judgment by default against one, and the other pleads performance, which is found for him, the plaintiff shall not have judgment against the other; for as the covenant was joint and the performance of it was established by the verdict, the plaintiff has no cause of action.<sup>c</sup>

Judgment cannot be arrested if a breach of the covenant appears on the record.

If on the whole record it appears that the defendant has committed a breach of the covenant declared upon, although the plaintiff states his real cause of action informally, judgment cannot be arrested; for, however imperfect the prayer of judgment on either side may be, the court are bound *ex officio* to give such a judgment as, upon the whole record, the law requires them to do. As where *A.* declares in covenant against *B.* and her husband, for that *B.* before her intermarriage, covenanted with *A.* by deed to leave certain accounts in difference between them to arbitration, and to abide and perform the award, provided it were made during their lives; and *A.* protesting that *B.* had not, before her intermarriage, performed her part of the covenant, averred that after making the indenture and the intermarriage of the defendants, the arbitrator awarded *B.* to pay *A.* a certain sum; and then alleged a breach for non-payment of such sum. After verdict, on *non est factum* pleaded; held, that upon this declaration, it must be taken that *B.* intermarried after the submission and before the award made, in which case, although the plaintiff could not recover on the breach assigned for non-payment of the sum awarded, because the marriage was a countermand to the authority of the arbitrator, yet, as by the marriage itself, *B.* had, by her own act, put it out of her power to perform the award, the covenant to abide the award was broken; and, therefore, judgment could not be arrested, on the ground that the marriage was a revocation of the arbitrator's authority, and that so the plaintiff could not recover as for a breach by non-performance of the award.<sup>d</sup>

that must be considered as a penalty; but where it is agreed that if a party do such a particular thing, such a sum shall be paid by him, then the sum shall be treated as liquidated damages. It is clear that where the principal sum is not the essence of the agreement, the quantum of damages may be assessed by the jury, but where the precise sum is fixed upon by the parties, that sum is the ascertained damages, and the jury are confined to it. *Lowe v. Peers*, 4 Burr. 2229.

<sup>a</sup> *Anon.* Cro. Eliz. 685.

<sup>c</sup> *Porter v. Harris*, 3 Lev. 63.

<sup>b</sup> *Thwaites v. Ashfield*, 5 Mod. 213.

<sup>d</sup> *Charnley v. Winstanley*, 5 East, 266.









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